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T H E

DECISIONS

OF THE

COURT OF SESSION,

FROM ITS

INSTITUTION till the Year 1764.

WITH SEVERAL

DECISIONS SINCE THAT PERIOD.

ARRANGED UNDER PROPER TITLES,

IN THE FORM OF

A D I C T I O N A R Y.

IN FIVE VOLUMES.

L O N D O N:

Sold for the Editor by *W. Hay*, at the Artists Exhibition-hall, near Exeter 'Change; *T. Cadell*, opposite Catherine Street; *W. Brown*, Corner of Essex Street, Strand; by *Mrs. Follingsby*, within Temple Bar, Fleetstreet: And by *C. Elliot*, in Edinburgh.

M DCC LXXIV.

THE
COURT OF COMMONS
IN PARLIAMENT ASSEMBLED

IN THE MATTER OF THE
PETITION OF THE
STATIONERS COMPANY

Entered at Stationers Hall.



LONDON
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AT THE STATIONERS' HALL
IN THE YEAR 1750

T H E
D E C I S I O N S
O F T H E
C O U R T O F S E S S I O N,
F R O M I T S
I N S T I T U T I O N till the Year 1764.
W I T H S E V E R A L
D E C I S I O N S S I N C E T H A T P E R I O D.
A R R A N G E D U N D E R P R O P E R T I T L E S,
I N T H E F O R M O F
A D I C T I O N A R Y.

VOLUME I.

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M D C C L X X I V.

DECISIONS

COURT OF SESSIONS



PREFACE

A BICENTENARY

THE DECISIONS of the Court of Session are of great importance to the public, and it is a pleasure to see them published in this form. They are the result of the wisdom and experience of the judges, and are of great value to the public. The present edition is a reprint of the original, and is intended to be a permanent one. It is published at the request of the public, and is intended to be a permanent one. It is published at the request of the public, and is intended to be a permanent one.





P R E F A C E.

THE Decisions of the Court of Session are held in the highest Regard. They constitute an Evidence of the greatest Weight in ascertaining our Customs; and they afford the most authoritative Interpretation of our Laws. They open up the Steps of their Progress, and

exhibit alike their past and their present Condition. In this Light they have Attractions for general Curiosity; but it is to Men of Business in particular, that they are necessary and indispensable Guides. By the Variety of the Questions they determine, they sharpen their Curiosity and assist their Invention; and no Case can happen, in which an Appeal may not be made with Propriety to their Testimony.

But being unwieldy by their Bulk they are not to be consulted with their Difficulty and Inconvenience. A regular Abridgment of them was therefore projected. It appeared in the Year 1741, and does the greatest Honour to the eminent Lawyer who executed

cutted it. This useful Work is not now, however, to be procured but at an exorbitant Price; and the great length of Time that has elapsed since its Publication, rendering it incomplete, a new Digest seemed necessary, which should comprehend whatever is most material in the former, and continue down the Decisions to a later Period.

WITH this Intention, the present Performance was undertaken, and it was a needless Task, to enlarge on its Utility. The Editor has diligently compared the former Abridgment with the Decisions at large; a Circumstance, which has enabled him to correct many Inaccuracies in it, and to supply Omissions, which appeared

peared to him of Importance. Its general Scheme and Order he has followed. In a few Instances, he has intermingled new Decisions with old ones; but, in general, what it might be easily known, what Proportion his Publication bears to the Work of which he conceives it to be an Improvement, he has placed the later Decisions respectively in the Close of the Titles to which they refer. When he met with Decisions, of which the Matter suited not any of the Heads in the former Abridgment, he framed Titles for them; and to Decisions from which there had been Appeals, he has been careful to subjoin the Judgments of the House of Lords. And, that his Work might be as perfect as possible, he has been studious

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to make accurate References to the Sources and Authorities, from which it is compiled.

THE Intention with which he has laboured, he is sensible, cannot justly be condemned; and he is conscious of having bestowed his best Ability to deserve the public Approbation.

Edinburgh, 24th Aug. 1774.

in order to give the student a full and complete knowledge of the principles and practice of the art, which is the object of this work.

It is the intention of the author to give the student a full and complete knowledge of the principles and practice of the art, which is the object of this work. The author has endeavored to give the student a full and complete knowledge of the principles and practice of the art, which is the object of this work.

OF THE

COURT OF SESSION

IN THE



THE
DECISIONS
OF THE
COURT of SESSION, &c.



.....

THE

SCIENTIFIC

ART

COURT OF RECORDS

.....

ACCESSORIUM

SEQUITUR PRINCIPALE.

AWARD being taxed at a small sum in favor of a man and his heirs, the privilege was extended to the wife, a conjunct fiar, tho' she was not mentioned in the infeftment granted to her husband. *Sinc.* March 1541. *Gourlay.*

A MILL, built by the heritor upon the lands where his wife was infeft in liferent, after the date of her gift, falls under the same as accessory: The relict enjoys the multures of her liferent-lands, and of the corn strangers grinded at the mill; but not the multures hired thereto by the heritor of his other estate, which is deemed part of the rent thereof; and this without any allowance claimable from the liferenter for the expense of building. *Feb. 16th 1666. Lady Otter.* This resembles the case of one's building on another's ground knowingly, whereby he is presumed to gift the edifice; observed by Lord Bankton, in his institutes, vol. 1. 509.

IN a process of abstracted multures, the pursuer's title is staid, tho' he did not connect his right with that of the party who first acquired the thirlage, and his infeftment of the mill found to carry the ancient thirlage along with it as a consequence. *Fount. 25th Nov. 1702. Bothwell.* — An ancient charter of lands, *cum molendinis et culturis*, sustained to infer immunity from thirlage in favor of a succeeding heritor of these lands, altho' he derived no right from the obtainer of the charter, because lands once free, are not brought under servitude again, but by the positive deed of the proprietor for the same. *Forb. and Fount. 11th July 1706. Dundas.*

SWINTON, during the usurpation, obtained a gift of

the Earl of Lauderdale's estate, and, by virtue of that right, obtained a decret of certification against a decret of valuation. This certification was found to accresce to the Earl when he was restored; for since Swinton did use the Earl's right, all advantages which were not personal, but consequent upon the real right, behoved to follow the right itself, and accresce to the true proprietor, as if a servitude had been acquired, or a vassal's right reduced, *ob non solum canonem*. Stair, 13th July 1664, Earl of Lauderdale. The like, 28th Feb. 1666, Earl of Lauderdale.—A person forfeited and restored, *per modum justitie*, may use any benefit the donatar had obtained during the forfeiture, such as a decret of preference, &c. in the same manner as the improvements made by a tutor do accresce to the minor, *qui meliorem potest facere conditionem pupilli, sed non deteriore*. Fount. 24th Jan. 1696, Earl of Cassillis.

IN improbations pursued by liferenters, the certification is restricted to the pursuer's interest, *i. e.* tho' the writs called for be decerned to make no faith, it only means, in so far as may prejudice the liferenter, but will not be beneficial to the heritor. Dur. Spot. (*improb.*) 13th Feb. 1627, Lady Borthwick.—A Bond being granted to a man and his wife in conjunct fee, and the children to be procreate betwixt them, an adjudication led thereon, at the instance of the wife and her second husband, for his interest, without mentioning her children of the first marriage, was found effectual, and to accresce to these children, she, as conjunct heir, having the *ius exigendi*. Falc. 15th Feb. 1684. Lord Pitligo. Fount. observed, 18th Jan. 1684.

ONE incest in lands, with the privilege of brewing within certain bounds, found to have right to plead upon decreets obtained by his author's confirming that privilege, tho' these decreets were not assigned to him, such privilege being real and following the ground. Dur. 25th July 1626, Stuart.

A MINOR having assigned a bond without an onerous cause, the assignee thereupon did diligence by apprising against the debtor. The assignation being quarrelled, upon minority and lesion, the assignee contended, That he was only bound to put the minor in his own place, by retrocessing him. The Lords ordained him

to convey his apprising, which being led upon the minor's debt, must follow the same, and accresce to the minor. Stair, 19th July 1672, Ruthven. — An inhibition used by an assignee found to accrue to a posterior assignee, after reduction of the first assignation, it not being reduced *ex capite fraudis*. Forb. 23d July 1713, Duncan. — A creditor in a bond, bearing annualrent, falling into civil rebellion, did, long after year and day, and after his liferent-escheat was gifted, lead an adjudication upon his bond; in a competition betwixt an assignee to the adjudication, and the donatar, found, That the donatar having right to the annualrents of the bond, the adjudication, in so far as led for security of these annualrents, must accresce to him. Forb. 10th Jan. 1712. White.

OLD Langtoun having given a public infestment to his son, for relief of cautionry, not for the payment of creditors, and without naming them, found, That creditors have not the privilege of that infestment; so that young Langtoun might prefer some and renounce the whole again to his father, or his creditors might prevent others by diligence. Marc. (*infestment*) 8th July 1691, creditors of Langtoun competing.

IN a bond of provision the granter was obliged to infest the creditor, and the heirs of her body; which failing, other persons therein named, &c. in an annualrent esseiring to the principal sum of 20,000 merks, and to pay the annualrent yearly to the creditor, and her heirs of tailzie aforesaid. The bond farther contained a clause, that the principal sum should not be exigible till after the creditor's marriage: She dying unmarried, whereby it could never be asked, it was argued, That the yearly annualrent must also cease from her death, *quia sublato principali tollitur accessorium*. The annualrent was found to subsist until redemption by the debtor, being constitute pure and as a principal right; and it was not repugnant that the creditor, in a certain case, viz. upon her marriage, should have an option either to continue in the said annualrent-right, or to take herself to a principal sum, quitting the annualrent-right. Stair, 24th June 1699, Stewart.

DILIGENCE raised by the principal executor, will accresce to the executor, ad non executa. See Executor.

ADJUDICATION AND APPRISING.

ADJUDICATION *contra hereditatem jacentem.*

A CREDITOR was allowed adjudication, *cognitionis causa*, upon an apparent heir's renunciation, altho' another creditor appeared, and offered to prove that the apparent heir had before behaved as heir. Dur. 26th Dec. 1626. — *contra* Scot. — An adjudication upon a decret *cognitionis causa*, is effectual, tho' the heir was served, and could not validly renounce, upon being charged to enter heir. Dec. 1731, Drummond.

IT is not an objection to an adjudication, *cognitionis causa*, deduced before the sheriff, that there was not an abbreviate thereof signed by the judge, nor recorded in terms of the regulations 1695, because these relate to the session only. Dec. 1731, Drummond. The like, Fount. 29th Dec. 1696, Murray. Fount. 24th Dec. Forb. 23d Dec. 1709, creditors of Marshall.

A Comprising against a minor, as served heir to his predecessor, found to subsist, and to be of the nature of an adjudication, *cognitionis causa*, when the minor, *ex capite minorennitatis*, is reponed, and renounces. Falc. 27th Feb. 1684, Dunlop.

AN adjudication being led against a minor on the passive titles, and he having been reponed on purpose that he might renounce, the constitution was sustained as a decret of cognition, so that no adjudication could be sustained of the lands wherein his predecessors, to whom he renounced, was not infest, tho' possessed by him three years. Falc. vol. II. p. 14. Nov. 22d 1748, Creditors of Kinmurity.

AN adjudication upon a renunciation to be heir, carries all bygones arising after the common debtor's death, tho' these are moveable; and this *ex necessitate juris*, there being no other method for affecting such a subject. Dur. 19th Dec. 1638, Corser.

AN adjudication being led *contra hereditatem jacentem*, upon a renunciation to be heir, the heir afterwards entering, cannot redeem, the renunciation being a virtual approbation of the pursuer's diligence. Stair, 27th Jan. 1680, M'Auly.

Adjudi-

Adjudication in implement.

THE assignee to an heritable bond, charged the cedent's heir to enter, and to grant procuratory, so as the assignee might be infest; and having thereupon obtained decret against the heir, as lawfully charged, and thereafter charged him with horning, and denounced the same, and now insisting for adjudication of the bond; The Lords, notwithstanding there was no renunciation executed, and tho' the libel was not alternative, either to fulfil the assignation, or pay a liquid sum, sustained the adjudication, in regard the same was agreeable to daily practice, and that the party was sufficiently discussed. Newb. 8th Feb. 1666, Cruikshank's.

A DEBTOR being obliged to infest his creditor in an yearly annualrent, an adjudication in implement thereof was sustained, tho' led not only for the annualrent bygone, but in time coming; the nature of such adjudication being in security as well as payment, whereby it is a regular diligence, tho' obtained before the term of payment. Stair, 24th Feb. 1675, Hamilton.

Adjudication in Security.

AN adjudication of a party's lands, upon an obligation in his contract of marriage, to employ a certain sum to his wife in liferent, and to the children of the marriage in fee, raised *stante matrimonio* by friends, at whose instance execution was by the contract allowed to pass, was sustained without necessity of previous personal diligence against the husband for implement. Forb. 27th Jan. 1714, Anderson. The like, Falc. and Fount. 2d Jan. 1684, Bruce.

Apprising.

IN matters of consequence, advocates were appointed by the Lords to be assessors to the messenger, who was judge to the comprising. Hadd. — 1610, Lord Saltoun.

APPRISINGS belov'd to be at the head burgh of the shire where the lands lie, or in *dominus paria*, at Edinburgh.

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burgh. And dispensations to hold courts of apprising in any other place, were not allowed to pass of course, but upon special reasons to be considered by the Lords, or the Ordinary upon the bills. Stair, 12th July 1671, heirs of Lundle. And so a warrant upon a bill to lead a comprising at another head-burgh than that of the shire where the lands lay, was found null, since it was not at Edinburgh, which is *communis patria*. Gosford, 21st July 1670, Lady Lucia Hamilton.—A decret of adjudication, pronounced by a sheriff, of an heritable bond, containing warrant for an infestment on lands without his shire, found null. Fac. col. v. l. p. 167. Hylop, 3d August 1754.

UPON any urgent occasion the messengers might continue the court of apprising till another diet: Stair, 12th July 1671, heirs of Lundle.

A SEARCH upon the ground of the land for moveables ought to precede the charge and denunciation, and every other step of the comprising. Dur. *penult.* July 1623, Nicolson.—A comprising was sustained, tho' no search was made for moveables at the dwelling-house, but only upon the ground of the comprised lands. Spot. (*comprising*) July 1624, Moncrief.—The like, where the dwelling-house was at a distance from the lands. Dur. 13th Dec. 1623, Lord Ley.—Where a superiority was comprised, there was no necessity for a previous search for moveables, it not being probable that the superior would have moveables on another's property. Dur. 29th Jan. 1624, Hope-Pringle.

A Comprising being expired, and a posterior creditor, for keeping it open, having alledged, that a previous charge of horning before the comprising was not given, and at the same time offering to pay the principal sum, and even the accumulations, with the interest thereof since debursing the same, and all other expences; the Lords repelled the objection, that a charge had not been given, because that practice had been in disuse past memory: And, as to the advantage taken of carrying away the estate by an apprising for a small sum, they found, That the remedy was not in their power; and tho' they had, in such odious cases, frequently modified exorbitant penalties, to hinder estates from being swallowed up, yet that they had no power to prorogate legals,

gals, and keep them open. Fount. 22d Feb. 1704, Livingston.

A COMPRISING found null, subscribed only by the clerk, and not by the messenger who was judge. Newb. 2d Dec. 1665, M'Calloch.—And a messenger dying, after deducing comprising, but before he subscribed the same, the Lords refused to allow another messenger, who only had executed the letters, but had not sat as judge, to subscribe it. Dirl. 3d Feb. 1675, Oliphant.—But a Lord Ordinary who had pronounced a decret of adjudication, and refused a representation against it, having died before the extract was signed by the clerk, or the abbreviate by his Lordship; the Lords remitted to another Lord to sign the abbreviate, and allowed the decret to be extracted, and the abbreviate recorded, tho' without the 60 days. Fac. Col. v. Ill. p. 319. Sibbald supplicant, 21st June 1764.

Adjudication upon Act 1672.

ADJUDICATION is competent upon this act, tho' there is no constitution obtained against the defender, upon which comprising might have been led before the act. Home, p. 234. Murray, 15th Jan. 1740.

AN adjudication being led, which did not repeat both the alternatives in the act, but only narrated the ground of the debt, and adjudged the debtor's whole lands, omitting the first clause anent production of a progress, &c. the Lords, in a competition with another creditor, refused to find the adjudication null; but because of the defect, they cut off its penalties, termly failures, and other accumulations, and sustained it only as a security for the principal sum and annualrents. Forb. 17th, Fount. 18th Nov. 1708, Veitch.

AN adjudication restricted to the principal sum, and annualrents, composition, &c. without accumulations, &c. for this reason, that the adjudication was in absence, and of the debtor's whole lands, and bore a fifth part more; for tho' it behoved the creditor to libel the same in his summons, being uncertain whether the debtor would appear, yet he ought not to have extracted the decree for the same, when the party did not appear. Falc. Home, 9th Dec. 1681, Geddie.—The like, Home, Dec.

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Dec. 1683, Falc. 16th Feb. 1684, Wilson: upon occasion of which an act of sederunt was made.—An adjudication of an annualrent, sustained for fifth part more; and it was found that tho' lands are only mentioned in the act, yet the meaning of it extends to annualrents as well as lands. Falc. 10th Jan, Home, March 1683, Ker.

A DEBTOR, in terms of the statute, having offered lands to the value of the sum libelled, and a fifth part more; and also having offered a progress, to purge incumbrances, and to ratify the creditor's right; and the creditor having given in a condescendence of incumbrances, some of which the debtor offered to take off by equivalents, and others being posterior to the creditor's right, could not prejudice it; the Lords found, that tho' debtors used to retard the first adjudger, by offering a progress, &c. yet these partial adjudications had seldom or never taken effect, and that equivalents were not to be obtruded in place of actual purging of incumbrances, and therefore they refused to restrict the creditor to a partial adjudication, unless the debtor either offered to purge them at the bar, or instructed that they were already satisfied and paid. Fount. 17th June 1709, Earl of Aberdeen.

A SPECIAL adjudication having been led for the principal sum, annualrent, and a fifth part more; in a redemption within the five years, the debtor offered payment of the principal sum and annualrent, the composition paid to the superior, and expence of obtaining investment in terms of the statute; The Lords found the adjudication not redeemable without paying the accumulate sum, being the principal sum, annualrents, and a fifth part more. 30th June 1737, Baillie.

IN an adjudication upon the statute, the Lords modified the price to be 18 years purchase, as the certain and constant rent, and 9 years as to the casual rent of coal. Dirh. 24th July 1673, Laird of Killbirnie.

Decisions

Decisions common to Adjudications and Apprisings. And, 1^{mo}, Of the debt which is the foundation of the diligence.

A COMPRISING was found null, because the sums decerned for were greater than the sums contained in the denunciation; *Pluris Petitio*, and the compriser was not allowed by declaration to alter the tenor of the decret. Hadd. 19th July 1622. Laird of Lugtown. — A comprising led for more than was due, being upon a decret decerning for the full mails and duties, as bygone non-entry duties before declarator, was annulled *in totum*, and the Lords would not sustain it *quoad currentem summam*, because they thought it indivisible, and so could not subsist in part, and fall in part; otherwise, the legal being expired, it must have stood for ever an absolute right of property. Dur. 19th, Spot. (*comprising*) 20th, July 1631, Earl of Kinghorn. — The like, Hope, (*apprising*) 22d June 1613, Blackburn. — It being objected to an adjudication, that the decret of constitution, upon which it proceeded, was null, in regard it concluded against the debtor, upon no other passive title than that of charged to enter heir; and yet that part of the debts decerned for, were acquired by the pursuer, after raising and executing the general charge; so that, with regard to these debts, the decret was without any foundation; the Lords sustained the objection, so as to strike these debts out of the accumulate sum, but not to annul the adjudication *in totum*. 26th Jan. 1739, creditors of Carrine. — An apprising was reduced *in totum*, a term's annual rent being appraised for more than was due. In this case the apprising was led by the person himself who got payment of the term's annual rent. Stair, 20th June 1678, Scot. — An adjudication was sustained accumulating a term's annuity fallen due after the summons, but before sentence. Falc. v. l. p. 378. Kennedy, 28th July 1748. — An assignee to a bond, on which arrestment had been used, and the arrester preferred to the extent of his debt, purchased in the arrestment, and adjudged for the whole bond, without mentioning his having made that purchase; the adjudication was reduced to a security for principal interest,

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terest, and necessary expence. *Falc. v. I. p. 261, Gordon, 30th June 1747.*—A comprising was sustained, tho' led for the whole sum, after part of it had been discharged by the compriser himself, in respect the debtor had appeared in the process of constitution, and neglected to found upon his discharge: But the Lords declared, that in redemption of the comprised lands, this sum should be allowed. *Dur. 11th Feb. 1630, Ker.*—An apprising led by a trustee, for behoof of the cedent, upon a bond, whereof part was paid, was restricted to the principal sum and annualrents due, without penalties, or accumulations. *Stair, Fount. 31st Jan. 1679, Irvine.*—An apprising, led by an assignee for his own behoof, upon a bond, whereof part was paid to the cedent without the assignee's knowledge, restricted to the principal sum and annualrents, to be accumulate at the date of the apprising, *ibidem.* An assignee having apprised for more than was due, the apprising was restricted to the principal and current annualrents, *ibidem.*—An apprising, led by an assignee for a sum whereof the cedent had received partial payments, restricted to the principal, current annualrent, and necessary expences, without accumulation of annualrents and penalties. *Harc. (comp.) Feb. 1685, Hilleside. Harc. (comp.) March 1685, Crawford.*—It being contended, that an adjudication led for more than was due, is *in rigore juris null in totum*, being in its nature indivisible, and similar to other legal diligences, which must be either unexceptionably good, or null *in totum*: the Lords in this case, where the question was betwixt the debtor and an assignee, who knew not of the payments made to his cedent, sustained the adjudication for the principal sum and annualrents, accumulate at the date of the adjudication, and annualrents thereof, and for necessary charges: but found no accumulation due upon the necessary charges. *13d Nov. 1738, Balfour.*—Two parties being bound in a bond, containing an obligation to relieve one another *pro rata*, one of them paid the debt, took an assignation to the whole, and thereafter a decret of cognition against the other party's heir for the one half; but in the adjudication, which narrated the assignation and decret of constitution, the lands are adjudged for payment of the whole sum. In a ranking, the other creditors insisted

to have the adjudication reduced *in totum*. The Lords considered this as an innocent mistake, and sustained the adjudication, as a security for the principal sum and annualrents truly due, to be accumulate at the date of the adjudication, but without penalties, or even necessary charges. 3d July 1739, creditors of Cunningham.—An apprising, led by a father in his own name, for a sum payable to him in liferent, and to his children in fee, which he was impowered to uplift and re-employ for their use, being quarrelled as null, L. 29 of annualrent, appraised for, having been paid before, the Lords found the apprising simply null, *quoad* the father's liferent, but found it to subsist entire as to the fee belonging to the children. Harc. (*comp.*) March 1683, Baillie.—The Lords refused to sustain partial payment of the penalty of a bond made to a liferenter of the principal sum, as a nullity; or ground to restrict an adjudication for the said principal sum and whole penalties, at the fiar's instance, Forb. 9th June 1711, creditors of Ross.

IN an action for mails and duties, it being objected by the defender, that the adjudication was led for more than was due, and therefore null, the sum adjudged being accumulated at a term prior to the date of the adjudication; the Lords found no nullity, nor ground of restriction in the adjudication; and, in general, that adjudications, accumulating at a preceding term, without decerning for annualrents from that term, ought to be sustained, and that only such must be annulled, or restricted, as decern for annualrents from the date of the accumulation. Forb. 21st June 1705, Lady Innerleith. The like, Forb. 10th June 1709, Wilkie.—The same objection being obtruded to an adjudication in a declarator of expiry of the legal, it was again repelled; but on account of the unfavorableness of an expired legal, the Lords found the same purgeable, if the debtor paid the sums due by the adjudication within five months. Fount. Forb. 25th March 1707, Innes.—It being objected to an adjudication, that the accumulate sum was partly made up of a bill bearing annualrent and penalty, which behoved to void the adjudication *in totum*, seeing all the debts were brought into one accumulate sum; the Lords found the bill and adjudication, in so far as it proceeds thereon, void and null, but not the adjudication *in totum*,
in

in respect the indorsement to the adjudger bears, that the bill was indorsed in trust for the behoof of the indorser. 1st Dec. 1738, Creditors of Carrine.

AN apprising is valid, notwithstanding of articles of compensation against the apprifer; because an apprifer is not obliged to restrict his charge upon mutual claims that may be due by him to his debtor: For the proposing compensation is the work of a debtor against a creditor, not of a creditor against himself. Stair, 23d June 1680, Grant. Harc. (*comprising*) Jan. 1683, Wright.

IN a ranking of the creditors of Castle Somerville, an objection was stated against the interest produced by Mr. John Lookup, that he had knowingly adjudged for more than was due; and tho' here was a plain *mala fide pluris petitio*, yet out of regard to equity, the Court sustained the adjudication as a security for the principal and interest, without expences or accumulations. Remark, Dec. p. 271. Falc. v. II. p. 293. 3d Dec. 1751.—Adjudication restricted to a security, allowance not having been given for certain rents possessed by the adjudger before the date of the adjudication. Fac. Col. v. II. p. 282. Creditors of Alison, 13th Jan. 1759.—Adjudication, led for more than was due, annulled. Fac. Col. v. II. p. 480, personal creditors of Brown, 16th Dec. 1760.—A bond being payable upon requisition, an adjudication thereon is ineffectual for accumulations. Fac. Col. v. III. p. 186, M'Guffock, Febr. 25th 1762.

AN adjudication being led upon several grounds of debt, it was objected against some of the bonds, that they were null, upon the head of usury, in regard annualrent was pactioned from terms prior to the dates of the bonds, and yet no evidence given that the debtor received the money at these terms; on the contrary, the bonds bearing the receipt of the money indefinitely, the present time could only be understood; the Lords found the objection against the Bonds not sufficient to annul them as usurious, but sustained it to open the legal of the adjudication, and to cut off the penalties and accumulations of the said bonds, and sustained the adjudications for the principal sums, penalties, and accumulations of the whole bonds whereon the adjudication proceeded, except as to these bonds quarrelled. 20th Dec. 1722, Henderson.

Here

Here the case was cited, determined a year or two before, betwixt Halyburton of Newmains and the Lady Monboddo, where an adjudication having been led upon a bond, without deducing the retention betwixt Martinmas 1672, and 1673, which was a trifle, and by oversight, the Lords reduced it to a security for principal, annualrents, and necessary expences, not only as to that debt, but as to several others, against which no exception could be made.

AN apprising, in so far as led for termly failures, in an infestment of annualrent, not sustained beyond the true interest and damage of the appriser, wherein it differs from *Exorbitant penalty.* an apprising led upon ordinary penalties in principal sums. Stair, 29th Nov. 1677. Orrock.—And even an ordinary penalty, where exorbitant, was restricted to the tenth part of the principal sum, and this even after adjudication was led. Stair, 30th Nov. 1680, Earl of Panmuir.—Exorbitant penalty in an adjudication being objected to, the Lords appointed the adjudger to be ranked for his whole accumulate sum, including the penalty, reserving the restriction of the penalty till making out the scheme of division. Fac. Col. v. II. p. 82. Creditors of Kinminity, 5th August 1757.

What Subjects are carried by apprising and adjudication.

NOTHING can be comprised but heritable subjects, or real rights; as tacks, or writs, concerning real securities, bonds to set tacks, not bonds for moveable sums, or other moveables. Dur. 25th July 1623, Earl of Errol. Dur. 24th Nov. 1638, Campbell.—And therefore an adjudication of an heritable bond, was refused to be passed, the defunct having made the sum moveable by a charge. Dur. *penult* Jan. 1627, Cowper.—An heritable bond is adjudgeable, even before the term of payment, tho' no infestment has followed. Forb. 16th June 1705, Stewart.—A tack, secluding assignees, is not adjudgeable. Remark. Deci. p. 135. Elliot, 4th Dec. 1747.

THE bygones before apprising or adjudication being moveable, are not carried by it but by arrestment. Dur.

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13th March 1627, M'Ghie. Dur. 23d Dec. 1630, Ogilvie.—Nor even the duties falling betwixt denunciation and decret of apprising. Dur. 16th Feb. 1633, Harper.—Nor these falling betwixt the citation in an adjudication and the decret. Falc. 1st Feb. 1684, Anderson. But an adjudication, upon a special charge, carries bygones, from the death of the predecessor who was last infest, in the same way as they are carried by an adjudication *cognitionis causa*, there being no other method in law for carrying bygones in these cases. 13th Feb. 1740, Dickson. The same thing was found, Anderson and others, Claimants on Ströwan, 23d July 1760.

AN apprising carries the reversion of the preferable apprising, tho' the denunciation, whereupon it proceeded, was prior to the denunciation upon the preferable apprising; because letters of apprising bear all right competent, or *that may be competent*, to the debtor. Dur. 18th Nov. 1624, Kincaid.

AN adjudication of a wife's lands, proceeding on her personal obligation contained in an heritable bond granted by her and her husband, is null, in so far as it adjudges the lands, but effectual to carry the husband's interest in the rents. Fac. Col. vol. III. p. 151. Menzies, 8th Dec. 1761.

AN appriser of the common good of Dysart, pursuing for the tack-duty of the hand-bell, it was alledged, that these obventions and emoluments, being of a moveable nature, do not fall under adjudication. Answered, These are the consequence of a real right, and belong to the pursuer, as the profits of fairs would fall to the compriser of a barony; the Lords decerned in favor of the adjudger. Harc. (*comp.*) Jan. 1686, Wilton.—The office of king's printer to one, his heirs and assignees, is adjudgeable. Home, p. 112. Blair and Nairn, 22d July 1737.—The office of principal ussler to the parliament, may be carried by adjudication. Rem. Deci. p. 127, Cockburn, 10th July 1745.—The privilege of superintending the elections of a royal burrow, may be conveyed by adjudication. Rem. Deci. p. 199, Caithness, 17th Feb. 1749.—A decret having been taken personally against the possessors of an estate, and it having been supposed it should only have been taken declaratory to affect the lands, an adjudication led thereon was sustained

sustained as sufficiently supported, Fal. vol. I. p. 378, Kennedy, 28th July 1748.—An adjudication, led on an estate disposed in trust on the disposer's debt, and the disponente infest, sustained. Fal. vol. II. p. 64. Creditors of Balmaghie, 22d Feb. 1749.

General clause in apprising and adjudication.

A GENERAL clause in an adjudication, of *all other* lands, without specifying particulars, was found null. But lands being adjudged under a certain name, *viz.* of a certain barony, all lands comprehended under that common designation, lying contiguous, were carried thereby, with the mills and woods thereon. Stair, Fount. 21st July 1680, Apprisers of the estate of Enoch competing. See Dur. 19th Dec. 1638, Corser, where the contrary seems to have been found.

AN apprising of a tenement, with *all right competent to the debtor*, was found to carry an infestment of an annualrent the debtor had over the tenement. Stair, 23d Jan. 1674, Nisbet.

A PARTY whose business was in some confusion, having disposed his estate irredeemably to his brother, but taking his back-bond to retrocess him so soon as he should be relieved of his cautionaries for him, and paid of what he owed him; and one creditor having adjudged, in special, the estate, and then the general clause being subjoined, of *all rights, &c.* and another having adjudged only the back-bond; the Lords found, that the general clause in the former adjudication carried this back-bond, and denuded the debtor, so that there was no room for the other special adjudication, and therefore preferred the first. Forb. 21st Dec. 1710. Fount. 20th Nov. 1711, Brown.

THE general clause in comprisings of lands, and *all right, interest, and claim of right, pendency or possessory, &c.* was not found to comprehend tenants, being but a clause of stile respecting lands, and extending no further. Fount. 17th Feb. 1702, Home.

AN adjudication of an annualrent-right is carried by an adjudication, adjudging, in general, all and sundry reversions, bonds, &c. and all other rights; &c. granted in

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favor of the debtor, concerning the lands mentioned in the libel. Fac. Col. vol. I. p. 12. Blackwood, 9th June 1752.—An adjudication, mentioning lands only, found to convey mines from an heritor who had obtained a charter of mines in terms of the act 1592, in competition with a creditor, who had adjudged the mines *per expressum*. Fac. Col. vol. I. p. 247, Oughterlony, 28th Nov. 1755.

Adjudications and Apprisings pass *periculo petentium*; and all defences reserved, *contra executionem*, unless instantly verified.

IN a process of adjudication, at the instance of an assignee, for part of his cedent's wife's tocher, the cedent not having performed his part of the contract of marriage; the Lords, nevertheless, allowed the adjudication to proceed, but with the burden of the obligation in the said contract in favor of the wife.

Home, Feb. 1686, Shearer.—It being objected in a process of adjudication, that the debts were suspended, and reduction and improbation raised against the same, and that these ought to be first discussed; the defender was allowed to repeat his reasons of reduction, by way of defence, if instantly verified; if otherwise, the lands were ordained to be adjudged, with reservation of the reasons of reduction *contra executionem*. Stair, 26th July 1676, Boyd.—The Lords allowed reasons of reduction of a decret against an heir, served *cum beneficio*, instantly verified, to be received *incidenter*, in a process of adjudication upon the decret; but they reserved the reasons of reduction, not instantly verified, *contra executionem*, both as to relevancy and probation. Forb. 8th Nov. 1711, Lord and Lady Ormiston.—A personal creditor was admitted to propound payment in an adjudication, *contra hereditatem jacentem*, led by another creditor, the alledgeance being instantly verified, and there being no other adjudication upon the estate. Fal. 4th Dec. 1685, Lord Yester.—The Lords refused to

stop

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stop an adjudication, altho' a decret of forthcoming, which was the ground thereof, stood suspended, and tho' this adjudication was the first, but reserved all defences, *contra executionem*, in the maills and duties there to be received; because an adjudication is *processus et judicium summarium*. Fount. 16th Dec. 1707, Tod.

IN a process of adjudication, it was not found competent for a third party to plead upon a right preferable, and exclusive of the right in the debtors person, sought to be adjudged; for adjudications pass, *periculo petentium*, and all defences are reserved, *contra executionem*. Stair, Dir. 15th Nov. 1666, Cheine. —

Adjudications pass periculo petentium, without necessity to instruct the debtor's right.

The contrary formerly found, but there it was notour to the whole Lords, that the debtor was denuded. Stair, 22d July 1664, Livingston. — In a process of adjudication, the debtor not compearing, the Lords decerned, reserving all objections *contra executionem*, notwithstanding the superior of the lands craved to be adjudged, appeared, and alledged, that his vassal the debtor, was, *ab ante*, denuded in his favors by a resignation, *ad perpetuam remanentiam*; but, in this case, there being no other adjudication, and the adjudger suffering nothing by the delay, the Lords ordained, before extract, the parties to debate their interests. Stair, Dir. 30th Nov. 1675, Kinloch. — In a process of adjudication, a party appeared and offered, *instante*, to instruct, that the debtor was denuded, that he himself was heritor of the lands, and that if the creditor would raise reduction, he would immediately produce his undoubted rights for onerous causes; the Lords, however, refused to take in the reduction summarily, especially as the party compearing was *minor*; and therefore adjudged, reserving all defences, *contra executionem*. Fount. 21st June 1700, Lord Arch. Hamilton. — The like, in an adjudication led upon the bond of an apparent heir, which the Lords refused to stop at the instance of a creditor of the defunct, offering instantly to debate, and exclude the apparent heir's interest in the estate, but allowed it to go out, reserving the interest of the defunct's creditor, *contra executionem*. Forb. 19th. March 1707, Buchanan. — In a process of adjudication, compearance being made

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for one who produced a disposition of the lands, with a base infestment thereon, repeating a reduction, and craving that the adjudication might be stopped, *medie tempore*, his reasons being *in jure*, and instantly verified; the Lords found, That before any adjudication, the complainer might insist on such reasons of reduction and nullity, as were instantly verified; but ordained him to condescend thereon, that it might appear of what kind they were. Fount. 31st Jan. 1712, Calder.—The Lords found, That where adjudications are craved upon the bonds of apparent heirs, and there is no notoriety of their predecessors having been heritors of these lands, nor concurrence of creditors striving for diligence, there ought to be no decret of adjudication, till they gave some document that the predecessor once had right to the lands by a sasine, or some other evident, and that the debtor had a contingency of blood to the defunct. Fount. 7th Feb. 1669, Gordon.—An apparent heir having granted a bond in trust, in order to lead an adjudication against his predecessor's estate, a piece of land sold by the predecessor, wherein the purchaser was infest and in possession, was struck out of the adjudication, the purchaser offering to hold the adjudication as led, in so far as to be a title to found all objections against the purchase. 19th July 1734, Duff.

BY the oldest decisions, the superior was not bound to infest a compriser, without instructing his author's right. Hope (*superior*) 14th Dec. 1615, Monteith. Hope (*superior*) ult. June 1619, Lord Corstorphin. Dur. 14th Feb. 1629, Grant. Dur. 12th March 1629, Colmslie. But this was altered by the later decisions; and superiors are now bound to infest apprisers, *salvo jure cujus libet et suo*, tho' the person charged to grant infestment contended, that he was absolute proprietor of the lands, Dur. 17th July 1632, Black. Dur. 11th March 1636, Scot. Dur. 29th March 1636, Cowan.—Yet in an adjudication in implement of a disposition, it was found, that this privilege did not take place; for it was contended, tho' superiors are obliged to infest apprisers, *salvo jure cujus libet*, where they get a year's rent, as well as ordinary adjudgers for liquid debts, *favore creditorum*; these considerations had no place here. Stair. 24th June 1663, M'Dougal.—Adjudgers of the *hereditas*

ditas jacens, found to have this privilege, tho' it was not 'till afterwards that the superior was allowed a year's rent for entering them. Stair, 9th Feb. 1667, Ramsay.

PRODUCING letters of general charge will not support an adjudication proceeding in a decret of constitution against a minor, without proving any passive title, or producing the said letters, but the adjudger will be allowed still to prove the passive titles libelled. Creditors of Newlaw, July 22d 1737, Home p. 114.—A special charge being blank in the lands, and consequently null, the common debtors not having been infest at the time, voids an adjudication, as to the accumulations and expiry of the legal, reserving to be heard, whether it is void *in totum*, Home p. 286, Hunter, July 3d 1741.—An adjudication, proceeding upon a charge to enter against persons who were heirs of line or conquest, but not the heir of investiture, found null. Fac. Col. v. I. p. 287, Earl of Selkirk, March 3d 1756.—Adjudication, restricted to a security, where the accumulate sum was left blank in the decret. Ranking of the creditors of Alison, Nov. 18th 1757. Fac. Col. vol. II. p. 96.—An apprising was sustained, led in the name of an assignee by a factor on a bond, granted to a person and his factors; and also an old apprising on a decret of constitution, whereof the grounds were lost, without prescription. Ramsay, 5th Feb. 1745. Fal. v. I. p. 62.—An apprising sustained on a special charge to enter heir in lands to one who had only a personal right, and whose christian name was blank in the charge, *ibidem*.—It was objected to an adjudication that it was null; the special charge, which was the ground of it, proceeding only on the bonds, and not on the decret of constitution; the Lords repelled the objection. Fal. vol. II. p. 301, Maxwell, 10th Dec. 1751.—An adjudication, led for sums not payable till the debtor's death, sustained without proof in the constitution of the death, in respect it was notorious, and his heir appeared. Fal. v. II. p. 120. Binning, 5th Dec. 1749.

Vide Competent.

Exceptions against adjudication after it is led.

Allow.

Allowance of apprising and abbreviate of adjudication.

A COMPRISING was sustained, whereupon infestment had followed, altho' not allowed, because the Lords allowance was only craved, to the effect charges may be obtained thereupon against the superior. Auch-enleck (*comprising*) 27th July 1630, Gilmor.

N. B. *This was before the a^{nt} anent allowances.*

THE Lords sustained the filling up of a greater sum, in the recorded allowance of an adjudication, than the sum truly due contained in the decreer itself, as a ground to take off the expiration of the legal of that adjudication, but not to bring in another adjudication, without year and day, *pari passu* with it. Forb. 22d Feb. 1712, Nairn.

Nature and Effect of this Diligence

THE question occurred anent the nature of an apprising or adjudication, if it is an absolute transference of property, in satisfaction of the debt, with a faculty of redemption within a limited time; or, if only a legal disposition *in security and payment*. The import of the question was, if an adjudication be but a security, or *pignus pratorium*, the bygone annualrents due upon the capital, the creditor dying during the legal, must go to his executors; whereas, if it be of the nature of a proper sale, under redemption, the land comes in place of the debt, which land must descend to the heir, leaving the bygone rents, not uplifted, to be claimed by the executor; but there remains no debt to be claimed, principal or interest; the Lords found that the apprising, and whole sums therein contained, without distinction, betwixt principal sum and annualrents, accumulate sum, and annualrents thereof, or accessories thereto, do belong to the heir, and no part thereof to the executor, notwithstanding the appriser died within the legal. 3d Feb. 1738, Ramsay.

A COMPRISING was found not a sufficient title in an action of maills and duties, unless safine had been obtained, or diligence done for obtaining thereof, Dur. 5th March 1628, Scot.—But now, as to maills and duties, a decreet of apprising is understood an effectual diligence, and equivalent to an assignation intimated; as to which, See tit.

Effect of a simple decreet of adjudication or apprising.

Competition.—A comprising is a legal assignation, needing no intimation, and therefore a second comprising of a right of reversion, tho' first intimated, was found not preferable. Hope, (*appprising*) 3d Feb. 1619, Bruce.

—Upon the same footing, a discharge of a bond, granted by the common debtor, after the bond was comprised, was found null. Dur. 25th March 1635, Ld. Yester.

—A proprietor having disposed his estate, with a reservation to himself of a yearly annuity, payable forth thereof, during his life; that reserved liferent was comprised by two of his creditors, and the last comprising being first made real by infestment; it was contended, that it ought to be preferable, because the debtor remained infest, in so far as he was not denuded by the disposition; and therefore, the reserved annuity could not be carried but by infestment. Pled, on the other hand, That the debtor was fully denuded, that the reserved liferent was indeed a burden upon the subject, but was not a right constitute by infestment, and therefore was carried by a simple decreet of comprising; the Lords preferred the first comprising. Dur. 21st March 1634, Maxwell.—In a contract of wadset, the proprietor having disposed his lands, holding feu of himself, with a clause of reversion, obliging the wadsetter to renounce his right of wadset, upon payment of five thousand merks; it was found, that a simple decreet of adjudication was sufficient to carry the reversion without infestment, or charge against the superior, and therefore preferable to posterior adjudications, with a charge against the superior, not within year and day. Home, 31st Jan. 1727, competition betwixt the Dutchess of Argyle and M'Neil of Loffet.

AN apprising, deduced upon a special charge, is effectual, tho' the apparent heir, who was charged, die before

before infestment pass upon the apprising, or charge against the superior, and the appriser, upon his decret, may proceed to charge the superior, and to demand infestment when he pleases. Stair, 6th Feb. 1668, Johnston. But still

without prejudice to the apparent heirs of the debtor in case he die before the appriser be infest, to serve and retour themselves in the lands, and tho' the compriser should throw in his comprising before the inquest, that would not stop the service and retour, unless he also produced a falsine thereupon. Spot. (*comprising*) 15th Feb. 1555, Comptroller. — The Lords refused to allow an apprising after the death of the party against whom it was laid. Dur. *penult.* July 1625, Guthrie supplicant. Yet, thereafter, Stair, 8th June 1665, upon supplication, they ordained apprising to be allowed; altho' not only the debtor, against whom it was deduced, was dead, but the sixty days long expired; which summative step was in respect of the act of parliament 1661, Cap. 31. in order to found a preference against posterior apprisings.

A CHARGE against the superior, without further diligence, is sufficient in a competition, even with other adjudgers infest. Stair, 17th June 1665, Heron. — The first charge on an adjudication renders it the first effective

one, tho' the adjudger did not offer the superior a charter, and a year's rent. Home, p. 299, Competition King with Innes, Nov. 17th 1741. — Horning against the superior does not pass upon an adjudication, pronounced in the sheriff-court. Rem. Dec. p. 53. Murdoch King supplicant, 2d Dec. 1742.

AS to the effect of a charge in competition with voluntary rights. See *Competitions*.

NO personal diligence can be used against the debtor after comprising, provided he offer to his creditor possession of the land comprised; and it was found, if the compriser will not accept of possession, that he ought, *eo casu*, either to renounce his comprising, or to forbear personal diligence. Dur. 22d Jan.

1631, Cloverhill, Dur. *penult.* Jan. 1628, Meldrum.
 Dur. 7th Dec. 1631, Scarlet. — But a compriser was
 allowed to retain his security, and at the same time to
 be personally executed against his debtor, unless he had
 also attained possession. Dur. 23d June 1627, Sinclair.
 But if the appriser has any separate security for his
 debt, there is nothing to bar him from putting the same
 to execution. Dur. 15th March 1628, Lord Blantyre.
 Personal diligence may be obtained, after possession
 obtained upon an adjudication. Home, p. 258, M'Banes,
 5th July 1740.

**Apprisers and adjudgers may be restricted
 in their possession to their neat annual-
 rent.**

IN restricting an apprising to a portion of the lands
 sufficient for the annualrent, which the Lords are im-
 powered to do by act 62. parl. 1661; they give the
 appriser his option of any of the appraised lands, except
 the debtor's house and mains. Stair, 27th June 1662,
 Wilson.

THE Lords found, That the clause in the act of par-
 lament 1661, empowering their Lordships to restrict
 the creditor, is a perpetual law, and does regulate
 comprisings, as well deduced after the act as before.
 Home, Dec. 1683, Falc. 16th, Fount. 20th Feb. 1684,
 Wilson.

CASSIE, elder of Kirkhouse, in the year 1715, was
 attainted of high treason, and his estate was found
 to belong to his son, upon this *medium*. That it being
 a tailzied subject, the father had incurred the irritancies,
 and fallen from his right before his rebellion. The La-
 dy Kirkhouse, spouse to Kirkhouse elder, in her con-
 tract of marriage, was provided to the liferent of 1000
 merks, to take place after her husband's decease: but
 after the fee was established in her son, having insisted
 against her husband for a separate aliment, upon the
 head of maltreatment, she not only obtained her son to
 be made liable for a separate aliment, but likewise,
 upon the act 1661, obtained, that the adjudgers upon
 the estate, should be obliged to restrict themselves to
 the annualrents during the legal, that there might be
 room

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room for her to affect the rents of the estate for that aliment. Nov. 1728, Lady Kirkhouse.

Ranking of adjudgers and apprisers.

ADJUDGERS, year and day after the first adjudication, on which infestment has followed, cannot acquire any preference by taking infestment, but are preferred according to their dates. Fac. Col. vol. I. p. 265. Creditors of Tulloch, Jan. 27th 1756.

APPRISINGS and adjudications upon *debita fundi*, from the nature of the subject, are preferable to all others prior or posterior: Thus, the Lords preferred a comprising for bygone annualrents of an heritable bond to a simple comprising, tho' prior in date. Hope (*apprising*) June 1610, Harris.

—And, a comprising for the king's blench duty to all infestments, anterior by disposition or comprising. Hope, (*blench duty*) 9th Dec. 1629, Moncrief.—And an adjudication for bygone feu-duties, to prior comprising upon personal debt. Gosford, 7th July 1675, Scrimzeour.

—An adjudication being led for payment of a sum contained in an heritable bond, with infestment, in a ranking of the creditors, the adjudger pled preference, not only for his principal sum and annualrents secured by infestment, but for the annualrent of annualrent, accumulated in the adjudication; the Lords found, that the adjudication being upon the personal obligation, and not upon the pointing of the ground, had no preference as to the accumulations, but was only to be ranked with the other adjudications. Dalr. 27th Jan. 1699, M'Kenzie.—

In the ranking of the creditors of Auchenbreck, the adjudgers, upon personal obligations in preferable heritable bonds, having insisted, that after drawing their principal sums and interest, in virtue of their infestments, they should be ranked, *pari passu*, with the adjudgers upon the personal bonds, for the whole accumulated sums, so as to entitle them to draw their full penalties and accumulations; it was found, that the heritable creditors-adjudgers were intitled to be ranked upon the funds, *pari passu*, along with the other adjudgers, only for what remained due of their accumulated sums, after deduction of what they

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they should draw, in virtue of their infeftments, July 12th 1769.

ADJUDICATIONS in security, come in *pari passu*, with simple adjudications for liquid sums, as was found in the case of an adjudication led upon a wife's contract of marriage, not only for the bygone annuities, but in time coming. Fount. 2d Jan. Home, March 1684, Bruce.

—The like, in the ranking of the creditors of Easter-Ogle, where an adjudication led in security of the daughter's bond of provision, the term of payment whereof was not till her age of 18, 10 years after the competition, was preferred to such adjudications as were not within year and day, tho' led upon bonds whereof the term of payment was past. Home 24th Jan. 1724, Miss Lyon.

FOUND, That an adjudication, led within year and day of another, could not come in *pari passu*, with it, because the first was for liquid debt, and the second only special for implement of a disposition, which the Lords thought was not included in the 62d act, parl. 1661; yet, says the author, the equity is the same in both, *sed legit remedium imperatorio*. Fount. 13th Feb. 1680, Adam.

—The like, Stair, 12th Dec. 1677, Lady Fraser. — In a competition betwixt two adjudications, both of them being for implement of dispositions; but the one had charged the superior to infeft him, which the other had not done: the Lords thought the diligence, by charging the superior, warrantable, and that, to find otherwise, were to make all adjudications ineffectual that have been led for implement of dispositions, and therefore, preferred him who had charged on his adjudication before the other; who, apprehending that superiors are not obliged to enter parties on such charges, did neglect that step of diligence as superfluous, and not mentioned in the act, 36th parl. 1469, which speaks only of creditors. Fount. Dal. 21st June 1704, Sinclair.

IN a competition about maills and duties, betwixt three apprisers, who had not the benefit of the act of parliament 1661, bringing apprisers *pari passu*: the first and third apprisers were infeft, but not the second. It was argued for the last appriser, Tho' the second apprising carries the reversion of the first, without

Adjudication in security.

Adjudication in implement.

Ordinary apprisings and adjudications.

infestment, yet the question being for the mails and duties, a right of reversion cannot carry these without a fine. The Lords considering the great disadvantage the lieges would sustain, if all apprisers were necessitate to take infestment, preferred the second appriser to the third. Stair, 22d Dec. 1664, Ramsay.

APPRISINGS, led after Jan. 1652, come not in *pari passu* with those led before, tho' within year and day. Stair, Dir. 12th Dec. 1666, Home. The contrary seems to have been found, Stair 24th Jan. 1667, Graham.

THE Lords brought in a comprising, led two years before the first effectual one, perfected by infestment, *pari passu*, as if it had been within year and day of it, tho' the 62d act, parliament 1661, seems only to speak of apprisings posterior to the first effectual one, and not of prior apprisings, except they be within year and day of them. Fount. 21st Dec. 1680, Forbes.

ONE adjudger having first obtained a charter from the superior, and, a few days thereafter, another adjudger charging the same superior to infest him, which is all the diligence necessary to be done during the legal, and, after two years, the adjudger, who had the charter, infesting himself thereon. The Lords, in the competition, thought that if only a few days or weeks had intervened between the charter and fine, a charge coming between, might have had the less to plead; but there being a more than two years, the obtainer of the charter was plainly negligent, and therefore found, that the giver of the charge had the first effectual adjudication, but brought in the other, *pari passu*, with him. Fount. Dir. 27th Dec. 1700, Butter.

APPRISERS are only brought in, *pari passu*, with the first effectual apprising, who are within year and day of the decreet, and not those who are within year and day of the charge, or infestment following thereupon. Stair, 4th July 1671, Lord of Balfour. Fount. 26th July 1671, Lord Rickarton.

APPRISINGS must be all within year and day of the first effectual, to bring them in, *pari passu*, and even after the first apprising is extinguished by payment, the second apprising, within year and day of the second, not brought in, *pari passu*, with it, unless they had also within year and day of the first. Stair, 12th Dec.

ford, 14th Dec. 1672, Street.—Nor are these posterior apprisings, even brought in, *pari passu*, among themselves, but are preferable according to their dates. Gosh. 21d July 1675, Boyd.—Infeftment upon the first apprising is communicated to all apprisings led within year and day; and tho' the first apprising be satisfied by intromission, the infeftment does not become extinct, *simpliciter*, but subsists, as to the other apprisings; and therefore, a second apprising, within year and day, tho' not infeft, was preferred to a posterior apprising without year and day, tho' infeft. Stair, 7th Nov. 1679, Swanton.—A first compriiser, whose diligence is completed by infeftment, within the year and day of the rebellion, taking the gift of the common debtor's eſcheat, after the said rebellion, and before the leading of a second compriſing, which yet is within year and day of the first, cannot prejudice the second compriſer by his gift. For, if he plead upon his compriſing, that second compriſer comes in, *pari passu*, with him, if, upon his gift, he is excluded by the second compriſer having the benefit of the first compriſer's infeftment, and the first compriſer cannot pass from his compriſing, so as to hinder the second compriſer from taking the benefit thereof, seeing that benefit is founded in the public law, and cannot be disappointed by the deeds of private parties. Gosh. Stair, 28th Jan. 1676, McLurg.

IN a competition between two adjudgers, the common debtor's right being a disposition to lands, with procuratory and precept, but no infeftment, the first adjudger pled preference, his adjudication, which denuded the debtor of his personal right, being first completed, and the other adjudger was not within year and day; and here he had made one step further, tho' not necessary, which was a charge against the superior. It was pled for the other adjudger, that his was the first completed and perfected right, in so far, as after having adjudged the disposition, he went on to take infeftment upon the procuratory and precept therein contained. The Lords brought them in *pari passu*, which was, in other words, finding the last adjudication the first effectual. Fount. 6th Dec. 1695, Dewar.—In a competition amongst adjudgers, all within year and day, the subject adjudged being a disposition, procuratory and precept, but upon which infeftment had not followed; the first adjudger

craved

craved preference, because his adjudication totally devalued the debtor, having only a personal right; and as to the other adjudgers, within year and day, he pled, that the act 1661, does only regulate adjudications of subjects whereupon infeftment is taken; and this, from the words of the act, describing the first effectual apprising, which is declared to be, by the first infeftment or charge against the superior: and the act also supposes, that other apprisings may be led before the first effectual. All which particulars are inconsistent with apprisings of personal rights, the first apprising in such, being always the first effectual. It was answered, that the preamble of this clause, in the act, is general, and respects all apprisings, whether of real or personal subjects, viz. *That creditors in a diligence, are preferred, by the more timely diligence of other creditors.* And the clause, mentioning the first effectual apprising, is not intended as an adequate description of the first effectual apprising, but as a particular example of what is the common case. The Lords brought the adjudgers in *pari passu*, Dec. 1724, Moncrief. — The like, as to an heritable bond, not clothed with infeftment. Dal. Pount. Forb. 26th June 1795, Stewart. — A personal bond bearing subscriptions, and consequently heritable destination, was adjudged by several creditors; the Lords found, that the act bringing in adjudgers, *pari passu*, does not take place in this case, being a subject upon which infeftment could not pass, and therefore they preferred the first adjudger. Feb. 1739, Sinclair. — The *pari passu* preference, introduced by the act of parliament 1661, takes place in adjudications of personal bonds for sums of money, heritable by the clause including executors. 19th Nov. 1734, Jackson. — Adjudications led against a debtor, who had in his person a disposition to lands, without procuratory or precept, brought in *pari passu*. 27th June 1734, relief of Mr Alexr. Falconer.

A DISPOSITION to lands, in a debtor's person, without procuratory or precept, being affected by several adjudications, at the instance of creditors, coming in *pari passu*, within year and day, one of the adjudgers went on to complete her right to the lands, by adjudging in implement against the disponent, whereupon infeftment followed: and it was pled for her, that tho' the other adjudgers did

did come in *pari passu*, with respect to the common debtor's right, *scilicet* the disposition, without procuratory or precept, that did not hinder her to be preferable in the land itself, which she only had affected by her adjudication in implement. The Lords brought in all the adjudications *pari passu*, and found, that the infeftment obtained, does accrete to the other creditors, upon their paying a proportional part of the expences. 27th June 1734. Relict of Mr. Alexr. Falconer.

OTHER apprisings, seeking to come in *pari passu*, with him who has the first infeftment, are bound to relieve him of the whole composition, and other expences of adjudication and infeftment, that being all the apprifer's pay for getting the benefit of the act. Stair, 5th Feb. 1663, Graham. Stair, 16th Jan. 1680, Gordon. Gosh. 18th Dec. 1668, Chisholm. — In a competition among apprisers, the Lords found, that the composition paid to the superior ought to be paid out of the fore-end of the rents of the lands, as being the expence of the first effectual comprising, and then, and not till then, decerned the tenants to pay the rents to all the rest of the comprisers that were to come in *pari passu*, according to their respective rights. Home, Nov. 1682, Gardnells. — Tho' a second apprifer would not come in *pari passu*, with the first, till the expence of the first apprifer's infeftment be paid; yet the Lords refused to allow the expence of changing the holding from ward to taxward, seeing the other apprifer declared he was to take no benefit by the same. Falc. 20th Feb. 1683, Lord Bearford.

SEVERAL charges against the superior being given on one day, upon different adjudications, without expressing the time or hour of the day, the Lords found, that these different adjudications came in, *pari passu*, with one another, or such as are prior, or within year and day. Home, 31st Jan. 1727, Dumbels of Argyll.

THE Lords refused to bring in an adjudication, *pari passu*, with other adjudications, altho' it was within year and day of the first adjudication before the Lords, but was not within year and day of the first effectual adjudication, on a *reconnaissance cause*, against the apparent heir renouncing, obtained before the Sheriff. Forb. 2d, Mount. 24th Dec. 1709, creditors of Marshal.

THE estate of Crimmonmogat, was possess, very near

the term of the long prescription, by charter and saline, passing upon a decreet of apprising, at one Peter Meldrum's instance, and had gone thro' the hands of several purchasers; at last Towie appeared, who had an apprising led within year and day of Meldrum's, and craved to be brought in *pari passu*, with the present proprietor, according to the act 620, parl. 1661. It was objected, that apprisers are only brought in *pari passu*, during the currency of the legal; and that Towie cannot have the benefit of the act 1661, now so long after expiry of the legal, otherwise there is no security in the records. The Lords found, that the privilege, introduced by the act of parl. 1661, in favors of adjudgers, before, or within year and day, of the first effectual apprising, is competent to the said adjudgers against the singular successors of the first effectual appriiser, as well after the expiry of the legal, as within the same. 23d June 1720. Barclay of Towie.

THE year and day is not counted by the number of days, but by the return of the day of the next year that bears the same denomination; therefore an adjudication, upon the 31st July 1680, was brought in, *pari passu*, with one led, 30th July 1679, as being within year and day, tho' not within 367 days. Stair, 26th Jan. 1689, Lady Bangour.

AN annualrenter was preferred to a creditor, whose debt was secured by adjudication, near three years prior to the infestment of annualrent, and within year and day of an adjudication, made effectual by saline, the adjudger, during that period, having neither been infest, nor taken any step to obtain infestment. Scot 26th Nov. 1764. In the ranking of creditors, it having been objected against the adjudications produced, 1st, That they were led for sums which were not in the adjudgers persons, at the time they charged their debtors representative to enter heir in general to him, and therefore, as to such sums they were void. And, 2^{dly}, That the charter from the king, under the Great Seal, upon one of the adjudications, was void, as flowing *a non habente potestatem*, in respect that the lands held of the late Earl of Mar, and at the time the charter was expedited, the rights belonging to the Earl were, by the act *quarto Georgii*, vested in the person of the commissioners

ADJUDICATION AND APPRISING. 31

missioners of enquiry; the Lords sustained both objections. Edgar p. 48. Creditors of Forbes, June 12th 1724.

Legal of Apprisings and Adjudications.

THE legal reversion of comprisings expired in seven years from the date of the comprising, and not from the time of the Lord's allowance thereof, or from the time of the infestment following thereupon. Spot. (*comprising*) Dur. 21th Nov. 1630, Laird Sempitlaw.

THE legal of an apprising is prorogated by a simple order of redemption, without declarator. Stair, 7th July 1676, Edgar. — An apprising, brought in by an apparent heir, is redeemable, within ten years, by the creditors; and this legal was found prorogated by a declarator, raised within the ten years, craving compt and reckoning, for the apparent heir's intromission, and offering payment for the superplus. Stair 26th June 1677, Kincaid. — Found, that a party's taking the annual rent of the sum in his comprising from his debtor, after the legal was expired, was not a formal prorogating of the legal, tho' it seemed to dispense with it *tacite*: However, the Lords superseded to declare the expiration of the legal, till Whitsunday then next; that if the debtor pleased to redeem, betwixt and that time, he might. Fount. 17th Dec. 1686, Lord Bangenry. — Two different estates, being appraised for the same debt, an order of premonition and consignation, used by the proprietor of one of the subjects, within the legal, was found to keep the legal of the apprising open, as to both subjects. Stair, 10th Feb. 1675, Lady Torwoodhead. — The principal sum, whole annual rents, and necessary disbursements, to be modified, being paid by intromission within the legal, the Lords found, that this did stop the expiring of it, altho' penalties and sheriff-fees were not satisfied, that were contained in the comprising. Gosh. 20th June 1677, Orrock. — Rents due before the expiring of the legal, are to be imputed towards extinguishing the comprising, tho' they have not been received till after expiring of the legal. Dur. 16th Jan. 1634, Tutor of Balmaghie. — An adjudication being led for divers sums, some whereof were prior to an inhibition served by another creditor, and others posterior, and the adjudication being expired without any intromission, or other payment

ment made to the adjudger within the legal; the Lords found, that the legal conveyed the whole right of the lands adjudged, without respect to the sums contracted after the inhibition, or tho' part of them had been paid within the legal. Pount. 6th July 1699, Hay of Alderston.

If the appriser continue to possess, after expiry of the legal, the debt is thereby satisfied, and extinguished, and the apprising turned into an absolute right of property which was found, tho' the apprising proved ineffectual, as to a great part of the lands appraised; the remainder being equivalent to the debt appraised for. Stair 18th June 1673, Leys.

Extinction of Apprisings and Adjudications.

AN appriser found accountable, not only for the seven, but for the whole years of his debtor's minority. Stair, 18th Feb. 1663, M'Kenzie.

AN appriser having sold part of the appraised lands within the legal, it was pled, that the real worth of these lands, ought to be imputed in extinction of the sum in the apprising. Answered, The appriser could not dispose the lands simply, but only his right of apprising, which would still be redeemable from his assignee, as well as from himself; and therefore, the Lords found, he was not countable for the whole value of the lands disposed, but for what sums he actually received. Stair, 14th Jan. 1669 M'Kenzie.

A SECOND compriser having pursued a declarator, that the prior was satisfied by intromission; and the defender having given in an account of disbursements, for prosecuting and defending of process, concerning his right, the Lords, in the count and reckoning, found, that the expences, in deducing comprising, and obtaining infestment, were only to be allowed, but no other disbursements; yet they allowed him retention of the superplus, after extinguishing the comprising for what was profitably expended, not only in relation to his own, but the pursuer's right. Dist. 26th June 1677, Malloch.

—The heir of an appriser of ward lands, having paid 4000 merks as the avail of a marriage, which fell by his prede-

predecessor's death, his intromissions with the maills and duties were ascribed to it, at least, he was found to have right to repete the same off the debtor, before the apprising could be extinguished. *Harcus (compriser)* March 1684, German of Dryburgh.—An expired adjudication, with infestment, will be cut off by the negative prescription, if no possession has followed. *Fac. Col. v. II. p. 186, Anderson, March 2d 1758.*—The possession of the widow of an adjudger on an heritable bond, on which infestment had followed, and that of his apparent heir, who had intromitted three years, but not that of the apparent heir's widow, or daughters before their making up titles to the adjudication, imputed in extinction of the sums contained in it. *Ibidem.*

Redemption of Apprisings and Adjudications.

A SECOND compriser having used an order of redemption against a first, the same was found effectual to the third appriser, redeeming the second within the legal, and it was found, that the order could not be passed from in his prejudice. *Stair 20th Feb. 1679, Tenants of Morton.*

AN apprising, led against an apparent heir, lawfully charged to enter, was found redeemable after the apparent heir's death, by the heir of the person last infest, tho' he did not represent the apparent heir, against whom it was led. *Stair, Goss, 10th Jan. 1669, Johnston.*

FOUND, that he who redeems from a compriser, ought to pay the year's duty of the lands, which is due to the superior; by act of parliament, altho' the superior had given it *gratis* to the compriser: for if he received him for service, or any such personal respect, that ought not to be profitable to the redeemer. And the same was found, with respect to the expences debursed by the compriser, in deducing his comprising, altho' he got it done *gratis*, since there is no reason the redeemer should be free of paying the expences, in such cases ordinarily paid by others; and this their Lordships declared, they would observe thereafter, when such cases occurred. *Dur. 2d of July 1625, Dr. Kincaid.*—An appriser

34 ADJUDICATION AND APPRISING.

priser may repair and uphold the houses, and, upon redemption, is intitled to the expences thereof; but in order thereto, he should intent action, to have the condition of the houses tried at the time of his comprising, and after the reparations are found necessary, he may discharge the same, and obtain them cognosced, as accord. Dur. penult. Nov. 1628, Livingston.

A SPECIAL adjudication is not redeemable, without paying the principal sum, annualrents, and a fifth part more. Home, p. 109. Baillie, 30th June 1737.

A PERSON adjudging an estate under sequestration, is not obliged to accept of a part, in terms of the alternative of the act 1672. Fac. Col. vol. III. p. 169, Farquhar 14th Jan. 1762.

ADJUDICATION a summary process. See summary process.

YEAR'S rent payable to the superior. See superior and vassal.

SUPERIOR may redeem adjudications, ibidem.

WHEN requisition or a charge is necessary upon heritable bonds, in order to lead adjudication. See legal diligence.

IF adjudication may be led upon a debt in diem, conditional, &c. See legal diligence.

ADJUDICATION led upon a debt, whereof the foundation is defective, or where the debt is not fully established in the creditor's person, how far it vitiates the diligence. See quod ab initio vitiosum.

APPRISING, or adjudication, carries not a right to the fruits as it does to the subject itself, giving only a power or faculty to intronit. See right in security.

DILIGENCE required of appraisers and adjudgers. See diligence.

APPRISING and adjudication makes the subject litigious. See litigious.

EXECUTIONS of adjudications and apprisings. See execution.

RECORDING of adjudications and apprisings. See registration.

IF one adjudger can remove a tenant, without course of the other adjudgers. See Solidum & pro rata.

PAYMENT, or intronit, if good against a singular successor in an apprising. See personal and real.

ADULTERY

A D U L T E R Y.

AN HEIRESS divorced for adultery, loses her conjunct-fee and tocher, and the liferent of her heritage, and the courtesy takes place as if she were naturally dead. Colv. March 1589, Innerwick.

THE Lords inclined to sustain a gift of escheat for adultery, tho' the party was not denounced to the horn, nor was there any sentence past in a criminal court, which the acts of parliament, touching adultery, seem to require; only there was a decreet of the commissaries, finding the marriage adulterous, and unlawful; the grounds that moved the Lords complexly, were, 1st, That the escheat, in such crimes, falls *ipso jure et ex lege sine facto hominis*. 2^{dly}, That here there was a formal gift on the woman's being denounced fugitive, which was conjoined by way of reply, tho' the declarator on it was not yet come. Fount. 3d Feb. 1698, Irvine.

IT is unlawful for the person divorced, to marry the person with whom the crime of adultery was committed, and the children, begotten of such unlawful conjunction, cannot succeed as heir to their parents. Act 20, parl. 1606. Gosh. 22d June 1670, Lyle.

IN a reduction of a decreet of divorce, obtained by a wife against her husband, for his adultery, upon this ground of iniquity, that the commissaries repelled this defence, "That, after the acts of adultery, the wife cohabited with her husband, as man and wife," which imported her passing from any prior injury known to her; the Lords found, that their conversing together, as man and wife, after the deeds of adultery were known to her, did infer the passing from divorce on these deeds; and found co-habitation a sufficient presumptive probation of the wife's converse with the husband, as wife, unless she proved, that she withdrew from the husband's bed, and lay in a separate room from him, in which case it must be proven, that she had carnal dealing with him, at least, lay in bed with him. Stair, 15th July 1681, Watson. Elizabeth Clement, after living with her husband for three months, deserted him, and lived in open adultery with another man, by whom she had a child.

Being

Being cited before the kirk-session of Crieff; she confessed her guilt, and suffered public penance in presence of the congregation. After her husband's decease, she claimed, from his representatives, the third part of his moveables, and the terce of his lands. Her claim was sustained, notwithstanding her adultery, which was not denied. 4th March 1762, Clement. What moved the plurality of the judges, as observed by Lord Kaims in his principles of equity, p. 236, was, that since there was no divorce, the pursuer's adultery did not deprive her of the quality of relict, nor consequently of her legal provisions.

Advocate.

AN advocate, refusing to serve any of the lieges against a Lord of session, not having a lawful excuse, was compelled thereto, under pain of deprivation. Hadd, 22d June 1605, Lord Balmerino.

ADVOCATES, admitted by the Lords, are privileged to procure in all courts of the kingdom; but if they offer any indignity to any inferior judge, sitting in judgment, he may condemn them in an amand, or suspend, or deprive them from procuring before him, according to the quality of the offence. Hadd, 28th Nov. 1609, Commissaries of Edinburgh.

AN advocate may compare for parties within the kingdom, without producing any mandate, and even when he officiously appears without warrant; this may make him liable for the parties damage, but will not weaken the decret. Stair, 7th Dec. 1676, Ballantine.

AN advocate cannot disclaim his client's superior without a special mandate. Erskine, 2d Jan. 1592.

A defender craving protestation, and the pursuer's procurator desiring a day to be assigned, at which, if they insisted not, they declared themselves content that absolution should be given *simpliciter* from the pursuit, just as if they had been summoned to insist with that certification; the Lords found, seeing the pursuer himself was not present to take the day with that certification, that no such day could be taken by, or assigned to advocates, which might bind their constituents, they not being summoned for that effect. Dur, 20th March 1630.

630, Ld. of Wardis.—A decret-arbitral being challenged by reduction, as being to the *enorm lesion* of a minor, one of the parties in the submission, it was not sustained as a homologation, that the pursuer's procurator, in a process against third parties upon the decret-arbitral, had made some judicial steps, unless the compearance had been in virtue of a special mandate. Gosf. 14. Feb. 1677, Duke and Duchess of Munmouth.

AN advocate cannot appear for parties out of the kingdom, without a written mandate. Stair, 3d Feb. 1691, — *contra* Stewart — An advocate, compearing for a defender out of the kingdom, was allowed by the Lords, in virtue of the privilege of his gown, to see the process, tho' not to plead, and make defences, without a special mandate. Forb. 31. July 1708, Butler and Gordon. Forb. 10. July 1712, Hamilton. — The Lords sustained action at a stranger's instance, tho' no mandate was produced, his advocate finding caution to produce it before litiſ-contestation. Auch. 15th Dec. 1629, Paterson.

IN a reduction of an admiral's decret against a stranger, at the stranger's instance, altho' he was neither in the country assisting the pursuit, nor any procuratory given by him to pursue, yet the action was sustained, seeing the same advocate compeared for him in this reduction, who had defended in the decret obtained against him before the admiral; only he was ordained to produce a procuratory, authorising the pursuit before litiſ-contestation, and that caution should be bound for that effect. Dur. 15. Dec. 1629, Paterson. — The pursuer being in the kingdom at intenting and calling of his process, his advocate may continue his appearance for him without a special mandate, tho', during the course of the process, he be occasionally out of the kingdom. Fount. 7. Dec. 1693, Melvil. Dalr. June 1716, Earl of Marchmont.

A PERSON having been advocate for a deceased defender, against whom a decret was put up before his decease, and the decret being now quarrelled as unwarrantably extracted; the Lords found, That the advocate had still interest to propose objections against the said decret, in order to the rectification thereof; and that the procurator for the defunct defender, as if the same

had been proponed before extracting; tho' this was to make him an advocate without a constituent, and to make his mandate continue *mortuo mandante*, and to hinder apparent heirs to state themselves, the *veri et legitimi contradictores* to their predecessor's creditors; but the Lords thought it a part of an advocate's faithfulness and duty, to carry on the process begun, seeing, *res non est integra et mandatum tali casu, morte mandantis non cessat*; and that he has a rational interest to see rectified, what he finds his deceased constituent was wronged in, lest the fault should be afterwards charged on himself. Fount. 16. Jan. 1684, Wilson.

IN an exhibition of writs, an advocate was obliged to depone, as a witness, anent the defender's having the writs, tho' he was the defender's lawyer in the cause. Dur. 14. Nov. 1628, Berson. — In an exhibition of writs, the advocate and agent in the cause were obliged to depone, their client being called, tho' it was argued, that a servant, factor, or person intrusted with the custody of writs, ought not to be examined in prejudice of their constituent, unless it were as a witness. Stair, 1. Feb. 1666, — *contra* Rollocks. — In a declarator, that a bond was merely in trust, the Lords ordained the defender's advocate to be examined as a witness, in so far as he knew the conveyance, by information of other persons than his constituent; but refused to examine him on the information of his client, because an advocate is not obliged to discover his client's secrets. Fount. 15. July 1680, Earl of Northesk. — The Lords found, that tho' advocates are not bound to discover the secrets of their clients, concerning the point of right, they are obliged to depone to the execution of trusts and private fraudulent conveyances. Harc. (*advocates*) Jan. 1684, Keith. — In the process of a tenor, the defender's advocate being cited, as a witness, by the pursuer, the Lords ordained him to depone, if he saw the writ in question, and what was the tenor of it; but would not put him to depone concerning any thing communicated to him by his client, further than what he might learn from sight of the writ itself. Stair, Goss. 21. Dec. 1675, Creditors of Warristrey. — In a process, Scot *contra* Lord Napier, it having been found, that my Lord was not obliged to de-

pone and exhibit, unless upon a special condescendence of the writs called for; the Lords next found, that there could be no interrogatories put to his lawyers and agents, as to writs come to their knowledge in the course of their employment for him or his predecessors, but such as are competent to be put to the Lord Napier himself. 10. Feb. 1737, Napier.

ADVOCATES and writers, being summoned by an incident, as havers of writs; the Lords found, that they might purge themselves by oath, that they had them not, nor had fraudulently put them away; and that no other kind of probation can be used against them. Auchin. 16. Dec. 1627, Kirkwood.—An advocate having granted a receipt of writs, at the foot of an inventory thereof, containing an obligation to produce them upon demand, to a person not in a public office, not being holograph, nor having writer's name and witness; the Lords found the granter no further liable for these papers, than to give his oath what he knew concerning them, what became of them, and how they were disposed of. Forb. 9. Feb. 1713, Blair.

Advocation.

THE Lords ordered, that, for the future, the Ordinary upon the bills may refuse to pass advocations, if he find cause; but that he ought to pass none without reporting them to the Lords. Dir. 8. June 1675.

ADVOCATION cannot be pass of sums within 200 merks, upon any reason of iniquity. Dir. 8. June 1675, Kyle. Now it cannot, by statute, 20 Geo. II. be pass for sums not exceeding, L. 12 sterling.

AN advocation cannot be received after sentence, tho' before extract, because *sententia definitio est ultimus actus judicis*, and the extract is but the clerk's part. Stair, Ed. Lammerton, 10. July 1662.—The contrary found, Nov. 1766, Wight. In this case it was decided, that advocation is competent at any time before extract, —A decret being pronounced before an inferior court, and the defender, upon his application, being allowed a time to give in his defence; and extract superseded in the mean time; and the defender having taken this opportunity to steal out an advocation, the Lords found

the same irregular, and remitted the cause. Fount. 24. March 1686, Mein.

AN advocacy being produced to the inferior court, after the judge had pronounced the decerniture, but before he dictated the sentence to the clerk, and before he was *functus*, by expressing the special tenor of the decreet, the decreet following thereon was found null, yet was sustained as a libel. Stair, Dir. 12. Dec. 1676, Holmes.

THE Lords found no *spretum mandatum* where the inferior judge had proceeded, tho' the advocacy was intimate to him, the intimation being made, not when he was sitting in judgment, but only at his dwelling-house. Spot. (advocation) 18. July 1627, Stewart.

A DECREET found null, *etiam ope exceptionis*, because led *post inhibitionem judicis*, or after advocacy. Hope, (advocation) 18. July 1613, Cranston.—A decreet of an inferior judge, after he was discharged by an advocacy, was found null, altho' the presenter, after using of the advocacy, had compared in many diets of process, after production of the advocacy, and before sentence. Hadd. 24. Feb. 1607, Lathoquhar.

A PARTY having proceeded to obtain decreet before an inferior court, after the clerk had subscribed a signature upon the margin of an advocacy, bearing, That it was produced and admitted, the Lords found this to be a contempt of their authority; without finding it necessary for the raiser of the advocacy to prove otherwise, than by the said subscribed signature, that the process was truly depending before the inferior court. Forb. 26. June 1706, Mullikins Supplicant.

A SERVICE being advocated from an inferior judge to the macera, all other judges were thereby found prohibited to serve, tho' only mention was made of that one in the advocacy; and the retour was found null, by way of exception. Dur. 18. July 1621, Cranston.

IN a process of adherence, the commissaries having admitted, *cum nota*, the nearest relations of the pursuer for proving the marriage; the Lords advocated the cause only *quoad* that point, but allowed them to go on as to other parts of the process, that being the single point complained of; which way of advocating, the author

ART AND PART.

author says, is somewhat extraordinary. Fount. 11. July 1704, Stirling.

AN action pursued by the sheriff, for cutting his ground, before his own bailie, advocate to the Lords, agreeable to the statute of Queen Mary, parl. 6. cap. 9. Hadd. Nov. 1611. Sanquhar.

Art and Part.

ONE found liable in a spolzie of riends, who was not concerned in the act of spoliation, upon its being proven that the corns were thereafter cast into his barns, threshed there, and disposed of by him. Dur. 26. Jan. 1628, Earl of Roxburgh. — Goods spolied, being conveyed by the spolzier directly to his friends house, found sufficient to make the owner of the house partaker of the spolzie. Hadd. 2. Dec. 1609, — *contra* Cowgrane.

A L I M E N T.

And, 1/2, Of the act 1491, cap. 25. anent alimenting of heirs.

AN apparent heir can sue for aliment without a service. Dur. 12. Feb. 1635, Hepburn.

A SUPERIOR, where lands had fallen in his hands by ward, decreed *Who intitled to* to give, during the ward, aliment to *an aliment* the vassal's relict, who was unprovided. Bal. 21. July 1534, Logan.

AN heir, pursuing a liferentrix, who was only relict of his grand-uncle, the Lords found her not liable in any aliment, because *Heir renouncing* he had possess by special singular titles, *not entitled* and had renounced to be heir. Forb.

16. Fount. 18. Jan. 1712; Lyon. — But in a pursuit against an heir, renouncing at the liferentrix's instance, for a certain sum, in name of aliment furnished to him by her; the Lords assoctied, in regard she was bound to aliment the heir, and the aliment was bestowed be-

fore the heir's renunciation. Stair, Dirl. 16. July 1667, Hamilton.

*Or if the estate
be sold.*

A FIAR has notitle to an aliment upon the statute, after he has sold the lands. Fount. 27. Jan. 1700, Sandilands.

THE modification of an aliment refused to a vassal of ward-lands, because he had rents

*No aliment if
the heir has o-
ther funds.*

besides these, and the superior bound only to pay proportionally, to supply the defect of the aliment. Hadd. 16.

March 1622, Heir of Milntoun. Bal.

1. Dec. 1534, Buchanan.—Heir entitled to a modification of the wardatons and liferenters, altho' he had lands and rents of his own the time of his father's decease, because they were since comprised for his father's debts. Hope. (Heir,) — 1619, Whitefoord.—An apparent heir suing a liferenter for aliment; the Lords considered the estate as it was at the defender's husband's death, when her liferent began; so that if it was not then exhausted by liferents, or debts, no aliment is due. Falc. Home, 7. Feb. 1682, Hamilton.

A SON, who was fiar, found entitled to an aliment from his mother, liferentrix, she being

*What if he has
an employment.*

married again, tho' he had been bound apprentice to a skipper, was eighteen years old, and had deserted his service,

and tho' the mother had only 600 merks yearly. Fount.

4. June 1687, Ramsay.—An aliment modified to an heir out of his step-mother's jointure, and made payable in money, notwithstanding the jointure was paid in victual, and tho' he was neither minor nor without a calling, being an advocate, but which afforded him no subsistence; and, tho' he was, at the same time, impugning her jointure in another process, as exorbitant, and was served heir *cum beneficio*, and none of his father's debts were real, or affected the estate at the time. Fount.

25. July 1705, Ayton.—An aliment to the apparent heir, sued for against the liferentrix, was not sustained, in regard the liferent was mean, and the apparent heir was major, kept a brewery, and was not *frugi, aut bonæ fame*, and the liferentrix kept one of his children. Stair, Gosf. 27. Jan. 1669, Stirling.—Aliment was refused to an apparent heir, because the sum liferented by the

the relief of his brother, was small, and no more than the annual rent of her tocher. *2dly*, The pursuer was forty years old, and therefore either had, or ought to have a trade, and that in the summons he designed himself preacher of God's word. Dur. 11. Feb. 1636, Sibbald.

—In a similar case, the same was refused, where the brother's relief, and the defunct's and pursuer's father liferented all betwixt them, the relief liferenting but 10 chalders of victual for 8000 merks she brought in tocher, and the pursuer being of perfect age, and bred a writer. Dur. Spot. (*heir*) 21. July 1636, Ramorney.

THIS act comprehends conjunct-fairs and liferenters, as well as donators of ward. Srair,

12. Dec. 1677, Preston.—But does *Who bound to* not extend to a father liferenter by *aliment*.

reservation, &c. Dur. 21. July 1686,

Ramorney,—A grandfather being liferenter by reservation, was found not obliged to aliment his grandson, who was left to his recourse upon his mother. Dur.

7. July 1629, Hamilton. Stair, 26. Feb. 1675, Whitefoord.—The grandfather, who had a liferent by reservation, was found liable to aliment the apparent heir,

the mother having no liferent, but of a sum of money which came by herself. Stair, 27. June 1662, Ruthven.

—The heir's aliment was found to be a burden upon his mother, and not upon the grandfather, tho' he enjoyed the liferent of the whole estate by reservation,

excepting an annuity of 1000 merks, provided to his daughter-in-law, the pursuer's mother. Jan. 1729, Hay.

—The Lords modified an aliment for a pupil, out of his mother's liferent-lands, tho' they were but gage lands,

and did not hold ward. Auchin. (*tutor*) 13. Feb. 1631, Finny.

—The estate of Lovat was settled in liferent to Fraserdale, and in fee to his son; Fraserdale

having forfeited his liferent-escheat, the donatar was found liable to aliment the heir, who had no separate

estate for his subsistence. Feb. 1722, Master of Lovat.

—A man, who had been declared an idiot by the Lords, and as such, had got a tutor-dative given him in ex-

chequer, being pursued by his niece, an infant, and his apparent heir, for an aliment, on this head, that, being

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in such a condition, he was no better than a liferenter; and all such are bound to aliment the fiar, who has not *aliando*; as in this case; the Lords thought the demand new, and without law or precedent, and that the circumstance of his fatuity did not alter the case, for he might reconvalesce; and this might be as well craved, if the fiar were an infant, who could be maintained on a small expence, and therefore found no ground for modifying an aliment. Fount. 15. Feb. 1709, Bonner.—One having disposed his lands in favor of his wife, her heirs and assignees, with a *proviso*, that after her death, a certain portion thereof should accresce and belong to his nephew; the nephew's daughter, and only child, after her father's decease, sued the wife for aliment, as apparent heir to her father and grand-uncle. The defence was, that there was no relation betwixt the pursuer and defender, and therefore no aliment due, *super jure natura*. 2do, The defender liferented no lands to which the pursuer could succeed as fiar. 3tio, The pursuer's father was denuded of this claim in his own lifetime, having disposed the same to his creditors for their security and payment, and to his wife, whatever should remain; the pursuer was not found intitled to an aliment. 24. Jan. 1729, Laing.—A liferentrix of land, is obliged to aliment the heir, but not the liferentrix of a sum of money. Remark. Dec. p. 31. Mirry, July 1731.—Aliment not due by a liferenter to an heir, where the estate was exhausted by contractions after the constitution of her liferent, which was not opulent. Fac. v. II. p. 264. Auchinleck, 10. July 1751.—One who does not succeed as heir to his father, is not bound to aliment his sister. Fac. Col. v. I. p. 145. 25th Jan. 1754, Anderson and Gibson.—One who succeeds to an estate as heir of entail, and does not otherwise represent his father, is not liable for aliment to his brothers and sisters. Fac. Col. v. I. p. 261. Malcolms, 16. Jan. 1756.—A daughter, executor, and universal legator to her mother, found liable to aliment her sister-uterine, who was destitute of any fund of subsistence. Fac. Col. v. II. p. 326. 8. March 1759, Scot.—The proprietors of an entailed estate, is bound to aliment his eldest son's wife. Fac. Col. v. III. p. 190. 1. March 1762, Adam.

TWO liferenters upon an estate, viz. the mother and grandmother, were found bound to aliment the heir, *pro rata*, off their liferents. Stair, 12. Dec. 1677, Preston. Fount. 20. Feb 1697, Seaton.—An apparent heir, suing for aliment, from his mother and grandmother, liferentrixes upon his estate, the grandmother was absolved, because she had formerly given down to her son, the pursuer's father, more of her liferent provision than the Lords would have decerned to the pursuer, had her provision remained with her entire. 12. July 1739, Allardice.—The contrary, Falc. 27. Nov. 1685, Heir of Kirkland. But, in a like case, this defence was not sustained for the grandmother, that she had a separate estate, viz. a liferent from a former husband, the half of which she voluntarily sold for payment of the debts of her husband, the pursuer's grandfather. Bruce, 12. July 1715, Cunningham.—An elder brother, who succeeds to his father in a considerable estate, is primarily liable to aliment his younger brothers and sisters unprovided; the males, till majority, the females, till marriage; and, in so far as they have been alimented by their friends, they have no action against their brother. 8. Feb. 1739, Douglas. Home p. 179.

A CHILD, and his tutor, suing his mother, the liferentrix of his lands, and her second husband, for an aliment; the Lords refused to admit her offer to keep and entertain him herself; and ordained the pupil to remain with the tutor; and sustained the action for aliment. Dur. 14. July 1627, Noble. Dur. 22. Feb. 1631, Finnie.—The like, Stair, 19. Feb. 1679, Sibbald.—An offer to aliment in family not sufficient to elide the claim, Falc. 27. Nov. 1685, Heir of Kirkland.

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A DONATAR of ward, found liable to aliment the heir, whether he intromitted or not with the rents, unless he instructed how he was barred. Stair, 19. Feb. 1679, Sibbald.

AN assignee to a gift of ward, found liable to aliment the

Benefit of discussion among those bound to aliment.

An offer to aliment in family, not relevant.

Donatar of ward liable, tho' he has not intromitted.

the heir. Stair, 19. Feb. 1679, Sibbald.—A fiar pursuing his mother, the liferentrix, for an aliment, whose liferent, tho' considerable at first, was now diminished by her debts, &c. and the fiar contending that it should be considered, not as it now was, but as her husband transmitted it to her; the Lords found her creditors, or singular successors, for onerous causes, nowise liable, nor affectable for any part of the liferent they had, and that the aliment was not real against them, nor the liferented lands, (tho' it is otherwise as to the aliment of ward-minors,) nor that her son had any regress against her, upon her warrantice, from her fact and deed, for diminishing the jointure, being done long before his intenting his action of aliment, so that the jointure must be considered as it now stands, and not as it was in the beginning; and finding it very mean, they refused to modify any thing out of it to her son. Fount. 14. July 1699, Ogilvie.

OF 1000 merks, which was the mother's yearly annuity, L. 100 Scots was modified to the apparent heir. 29. Jan. 1729, Modifications of the aliment. Hay.—In the like case, the Lords modified L. 100 Scots, out of 600 merks a-year. Fount. 4. June 1687, Ramsay.

Aliment due, *ex debito naturali*.

ALIMENT decerned to an apparent heir in proportion to his father's estate, and the father's offer of alimenting him in his family refused, in respect of the notoriety of his maltreatment. 19. July 1716, Morison.—An interim aliment, decerned to an apparent heir of an entailed estate, against his father, married to a second wife, and who had given some ground of complaint for maltreatment, tho' he was much incumbered with debt. 30. July 1734, Hepburn.—A father being indigent, and having a great family of small children, was sued to aliment his eldest son, who had been taught a trade; the Lords considering the great portion the pursuer's mother brought

brought, and that he was a person of no ability to aliment himself by his industry, decerned the father to receive him in his house, or else, at his option, to give him 200 merks. Stair, 13. Jan. 1666, Dick. — A Father, being furious, or an idiot, and liferenting the whole estate; the Lords, with respect to his children, found this difference betwixt him and other fathers, that they decerned an aliment to his children, out of his liferent, (they not having *aliunde*) tho' he had educated them till they were of age, and could do for themselves, and were also married. Gosf. 10 Dec. 1672, Carstairs and her husband. — The Lords found a father, who, by threats, forced his daughters to serve others, when he was in a condition to maintain them in his family, liable to pay them a competent aliment, tho' they were in service. Hare. (*aliment*) July 1687, Cairns.

THE mother is obliged to aliment her children, *jure natura*, but it is sufficient that she aliment them in her family; in this case *Mother liable*. it was also found, that the children could demand no aliment or modification, *extra familiam*, even tho' it was alledged, that it was unsafe to trust them to the mother's breeding, seeing she had miscarried, and being a woman of quality, had married a deposed minister. Stair, 23. Feb. 1666, Children of the Earl of Buchan. — The mother having a jointure, must club with the heir, in alimentering younger children, when the circumstances of the estate require it. Falc. v. II. p. 23. Remark. Dec. p. 178. 13. Dec. 1748, Bisset's.

ALIMENT is due to a mother, *super jure natura*, but sisters not intitled to an aliment, where the brother does not represent their father. Fac. Col. v. III. p. 96. Sitons, *Mother intitled to aliment*. 6c. 25. June 1761, — A mother alimentering an idiot son, who had no estate, for 30 years, was found to have no claim against an estate, to which the idiot afterwards succeeded for the aliment furnished during these years, but after these, when he succeeded to the estate, modified L. 40 to her. Fac. Col. v. I. p. 287. Drummond, 2. March, 1756.

AN heir, succeeding to a competent estate, as heir

to his father, was found liable to aliment his brothers and sisters, being wholly unprovided. *Heir liable to aliment his brothers and sisters.* Stair, 24. Jan. 1663, Children of Netherlie.—The like, Stair, 10. Nov. 1671, Hasty. Bruce, 23d July 1715, Children of Knapperny.—In

a suspension of a bond granted to a craftsman, by an eldest brother, for a younger brother's apprentice-fee, upon minority and lesion; the Lords found, that the younger brother, having no other means nor provision, his eldest brother, who was heir to his father, and had the estate, ought to entertain him, and to put him to a calling, and refused to sustain the reason of lesion. Dirl. Newb. 5. July 1676, Chieflly.—The Lords found a minor liable for an accompt of mournings, taken off by him for himself, and brother, and sisters. Forb. 14. July 1705, M'Dowal.—Younger children suing their elder brother for an aliment, who had an opulent fortune from his father, and they unprovided; the Lords allowed a competent aliment yearly to each of them, the boys, till 14, and the girls, till 12 years old. Fount. 13. Jan. 1697, Children of Attenburn.—A sister succeeding to the means of her father and mother, was found liable for the expence bestowed in alimenting her furious brother, but that only in so far as she was *lucratus*, by being freed from entertaining the furious person in her own family. Stair, Fount. 23. July 1678, Thomson.—The younger children of a family, who were all unprovided, applied to the Lords for an aliment till majority, which accordingly was granted; but it was a question who should uplift and discharge, they having no tutors, and the aliment small, it was concerted among the friends, that they should divide the children among them, discharge the heir, upon payment of their several proportions, grant bond to apply it for their aliment and education, and hold count for the same at their respective majorities. To this the Lords condescended, and declared, that their discharge should be a sufficient exoneration to the heir and his tutors. Fount. 2. Feb. 1711, Somervell's.—During the dependance of a process of reduction of a father's testament, betwixt a sister pursuer, and a brother defender, who was both heir and executor, she craving an interim aliment,

ex jure nature; the Lords found, that she being married, could crave no aliment from her brother. Fount. 23. Feb. 1711, Maxwell and her husband.

A BOND of provision being granted to a daughter, payable at a certain time, the heir was found liable to aliment her, in the interim. Stair, 8. Jan. 1663, Lady Otter.—The like, Stair, 11. Feb. 1763, Fraser.—The like, Stair, 5. July 1677, Children of the Ld. of Lauriston. Stair, 31. Jan. 1679, Straitons.

A FATHER granted a bond of provision to his daughter, payable at her age of 17 years, with an obligation to entertain her in the mean time, but no obligation of annualrent: some years after her age of 17, she insisted, against the representatives of her father, for aliment from her father's death, till the time her bond was payable, and for annualrent thereafter; the Lords found aliment due after the term of her bond, as well as before, but no annualrent. Stair, Dirl. 21. Jan. 1668, Stewart.

A MOTHER, pursuing the heir, for an aliment to her daughter, an infant, the heir's sister, whose portion was not payable till her age of 15; the Lords modified *Modification of this aliment.*

the third part of the annualrent of her portion for aliment, till she should be seven years old, and half of the annualrent from that till ten, and two thirds of her annualrent from ten, till her age of fifteen, which was the term of payment. *Nota*, this, as the author says, is the common rule of modification in all cases, when respect is had to a child's bond of provision. Fount. 8. Feb. 1678, Cleland and Gedes.—A bond of provision having been reduced on the head of a deceased, and thereafter an action of aliment having been brought against the heir; the Lords restricted the annuity provided to the widow, and modified an aliment to be paid to three younger children, to be divided equally amongst them, so long as they shall remain minors; and, after the majority of the eldest, to the other two, equally between them, so long as they continue both minors; and, after the majority of the two eldest, to the remaining one, so long as he or she shall remain minor; and failing of any one, or more of them, by decease, in minority, to the survivors equally, or to the survivor;

and found, so soon as the relict's annuity should cease by her death, the aliment of the children should be increased yearly, to be divided, subsist, and terminate in the same manner with the original aliment. Fac. Col. v. H. p. 264. 18. Dec. 1758, Logan, and younger children of Hugh Campbell.

Children bound to aliment their parents. A PERSON being reduced to extreme want and misery, by providing his eldest son with the gross of his estate, and thereafter disposing the remainder to his second son, to get good matches to them; the Lords, upon the father's application, modified an aliment to be paid to him by the said two sons, *pro rata*, of what they got from him. Forb. 30 July 1710, Brown.

Aliment by Paction.

IN a contract of marriage, the husband became bound to pay to an only daughter, 6000 merks, at her age 16, and in the mean time to maintain her in bed, board, schools, cloaths, and all other necessaries. In a ranking of the husband's creditors, wherein the daughter appeared with an adjudication upon this claim of aliment, it was pled for them, that this stipulation to aliment, was no more but exegetic of the natural obligation, and must cease when the father is no longer in a capacity to aliment himself; the Lords found, that a paction of aliment, tho' constitute by contract of marriage, cannot compete with the onerous debts of the father, he being coming bankrupt. 13. Feb. 1736, Falconer.

A WIDOW, who liferented her daughter's portion of 1200 merks, entering into a second marriage, took an obligation in the contract from her future spouse, to educate and aliment her daughter suitably. In a process, at the daughter's instance after her majority, for a liquid sum in place of aliment; the Lords decreed for 300 merks a-year, and found it not sufficient implement of the obligation, that the defender offered to aliment her in his own house with her mother, as was done for bygone years. 27. Jan. 1736, Moncrief.

HUSBAND must aliment his wife. See husband and wife.

ALIMENT

ALIMENTING of prisoners. See prisoners.

ALIMENT, when presumed gifted. See presumption.

ALIMENT, if attachable by creditors? See personal and transmissible.

Alternative.

A MAN giving bond to pay a sum at a term, and, in case of failure, to invest the creditor in certain lands, is no alternative, so as to give the election to the debtor; such clauses being introduced in favor of creditors, so that this is an exception from the rule. Dur. 5. July 1623, Brown.

A CHAMBERLAIN having given bond to his master, with this alternative, either to continue bygone debts against the tenants, or pay the debt himself, but without saying, *betwixt and such a day*; the Lords, in a suit at the master's instance, repelled the chamberlain's defence, That now he had recovered decreet against the tenants, and was willing to assign; and decerned *simpliciter* against him, in regard he had done nothing against the tenants for three years; and that there being no day set in the ticket, he was *instantor debitor*, but superseded execution from July till November; that, in the mean time, he might operate his payment from the tenants. Newb. 8. July 1665, Earl of Rothes.

ONE having a tack of tiends, assigned the heritor to the tack of his own tiends, "Obliging himself to procure new tacks at the expiration of the former, or to refund the money then paid for the assignation." This was found not to be an alternative obligation, but that the granter must grant a new tack, if it was in his power; and if not, that the refunding of the price, was *loco damni in facto impressibili*. Gosh. 32. July 1673, Nisbet.

A PARTY having been decerned by an inferior judge, to deliver to the other some writs in his hands, or else pay a sum, the election here being the debtor's, and he never having been charged on the decreet, before he was poinded for the liquid sum, the Lords found the poinding unlawful, and decerned restitution of the goods, and the prices to be modified by their Lordships; and

also for payment of the expences, damages, &c. Dur. 25. July 1638, Brown.

A FATHER having granted a bond of provision to his daughters, obliging himself to pay the sum at their ages of 15 years, or at their marriage, they marrying with consent of himself, and certain other persons named; it was pled for the children, in a process for payment against their brother, the heir, that the bond was purisied, by their arriving to 15 years, and payable sooner, in case they had been sooner married; the Lords found the clause suspensive of payment, till it appeared how the children would marry. Stair, 31. Jan. 1679, Straitons.

Annat.

The annat found to extend only to half a year more than the defunct had right to *proprio jure*. Stair, 26. July 1661, Ker. Found formerly to extend to a whole year. Dur, 16. June 1629, Smeiton.—And afterwards, Gilmour, July 1662, Wemyss. See act 13. par. 1672. A minister, having survived Michaelmas 1741, tho' he died before Martinmas, the term appointed for payment of the stipend, found intitled to that whole year's stipend for his incumbency, and the widow, and nearest of kin, were found intitled to the half year's stipend that was payable at Whitsunday 1742, for the annat. Falc. v. l. p. 245, Wood, 5, June 1747.

THE annat extends to the profit of the glebe, if there be no new intrans. Stair, 19. July 1664, Scrimzeor.—Otherwise the glebe falls not under the annat, except the crop thereof, if it was sown before the minister's death. Stair, 6. July 1665, Colvil.

ANNAT divides betwixt the wife and nearest of kin, where there are no bairns. Stair, 24. June 1663, Scrimzeor. Stair, 22. Jan. 1679, Spence and Clark.—Belongs to the nearest of kin, there being no wife or children of the defunct. Stair, Newb. 6. July 1665, Colvil.—The one half of the annat goes to the widow, by herself, and the other to the children, among whom it is proportioned *in capita*. July 1747, children of Macdermeit.

IN a question, whether the annat (whereof the terms of payment are determined by the statute 1672) be due to the relict and children of a stipendiary minister of a burgh, whereof the stipend is paid by a contribution, there being no tithes out of which it can be paid, tho' it is commonly looked upon as a *debitum fructuum* only; yet the Lords found all stipendiary ministers included in the act, whether paid in money or victual, and therefore found an annat due here. Fount. Forb. 8. Feb. 1709, Shiel's representatives. Fac. v.l. p. 245, Wood, 5. June 1747.

A MINISTER, who had sisters, having assigned his annat to his brother's son; the Lords found, that it belonged to his nearest of kin, *proprio jure*, and not to his assignee. Fount. Hareus, (*Ministers*) 18. March 1686, Alexander.—Whether it can be evicted for the minister's debts. See Dur. 9. Dec. 1623, Henderson's children. Dur. 28. Feb. 1628, children of the Bishop of Galloway.—The annat is a legal gratuity in favor of the wife, children, or nearest of kin, that cannot be burdened with the defunct minister's debts, not being in *bonis defuncti*. Fount. 20. Feb. 1694, Donaldson.

THE annat being indulged by the law to the wife, bairns, and nearest of kin of the defunct minister, and originally their right, needs no confirmation. Stair, 16. July 1673, Ker.

ANNUALRENT.

Due ex lege.

ANNUALRENT due upon inland bills, as well as others, in respect that the act 36. parl. 1696, extends the statute 1681, to inland bills and precepts. Forb. 8. Fount. 28. June 1705, Blair.

A BILL of exchange bears annualrent against the acceptor from the term of payment stipulated in the bill, tho' not protested for not payment. Home, 14. Nov. 1718, Baynton and Shaw. Formerly otherwise decided. Forb. 15. July 1718, Watson.

Due *ex facto*.

ANNUALRENT once paid, implies a paction to continue payment of the same. Gosf. 15. Jan. 1675, Cathcart. Dir. 20. Dec. 1676, Carnegie. Spot. (*usury*) Dur. 4. March 1628, Forrester. Gosf. 15. Stair, 17. Nov. 1671, Hepburn.

ANNUALRENT, stipulate for one term, found ever due till payment. Gosf. 13. Jan. 1669, Winton. Dir. Gosf. 20. Dec. 1676, Carnegie. Dur. 2. Dec. 1628, Zair. — A debtor, by a missive letter, having obliged himself to pay rent for the time bygone, annualrent was found due also *in futurum*. Stair, 13. Jan. 1669, Home. — A contract of marriage, bearing only an obligation to pay the sum at a certain term, with one term's annualrent, annualrent was decerned for all terms bygone, since the date of the contract, in respect it was for tocher. Spot. (*usury*) 16. Feb. 1629, Keith. — In a bond of provision, the term at which annualrent should commence not being fixed, but left open, as the father should afterwards determine, and he having died without fixing the same; it was found, that the children, being alimented during the lives of their father and mother, annualrent could only begin to run after the death of both, and not from the father's death. Fount. 17. July 1696, Nairn. — A party having given ticket for a sum, payable at a precise day, and if not then paid, obliging himself to grant bond for it, bearing annualrent; the Lords, altho' the creditor, after elapsing of the day, did not require any such bond, yet found annualrent due. Fount. 27. Feb. 1702, Houston. — A legacy payable to one, in case he should demand it within seven years after the testator's death, and, upon his failing to require it in due time, payable to another, with annualrent during the non-payment, having accrued to the substitute, thro' the institute's neglect to call for it within the limited time, he was, by the Lords, found to have right to the annualrent for the same, from the testator's death. Forb. 12. July 1711, Neillsons.

A PARTY, by a reserved faculty in his contract of marriage, being allowed to provide a second wife and

her

her children in a certain sum, without any mention of annualrents, the sum was found to bear interest from the first term, after dissolution of the second marriage by the man's death, for the relief's use; for this was implied in the reserved faculty, by which the liferent was designed only for the wife, and the fee for the children. Fount. 12. July 1699, Kinfauns.—One, in his contract of marriage, bound himself to provide a certain sum to himself and spouse in conjunct-fee and liferent, and to the heirs of the marriage; but in case of his predeceasing without heirs of the marriage, his spouse was to have power to dispose of the foresaid sum: This event happened, and the question occurred, Whether the sum bore annualrent? which would intitle her second husband to the *jus mariti* only: No annualrent was stipulated in the contract; but it was argued, That the provision of liferent, was virtually a stipulation for annualrent: The Lords found the sum heritable, and fell not under the *jus mariti* of the second husband. 16. June 1733, Millar.

GEORGE having borrowed 8000 merks from Peter, his brother, gave a wadset therefore; George being an old man, without hope of children, the reversion was granted to him only, and to the heirs of his body, and his liferent of the wadset was reversed, without mention of any back tack-duty or annualrent; in a reduction of the wadset, Peter alledged, that, albeit the wadset bore no annualrent, yet he having lent his money in hope of succession, and his brother having now married a young wife, he ought not to take advantage of him, seeing the annualrent is due in equity for the profit of the money; it was found, that annualrent could not be due in this case, unless it had been so pactioned and agreed. Stair, 11. Dec. 1662, Logie.

A PUPIL's step-father, giving bond to the tutors to be countable for his wife's intromissions; this was found to import also payment of the annualrent thereof, tho' no mention of annualrent was made in the bond. Auchinleck, (tutor) 17. July 1636, Tutors of Vallenge.

Due ex mori.

DENUNCIATION makes the sum bear annualrent, tho'

tho' the horning be not registred. Stair, 11. Feb. 1671, Smith. And yet escheat falls not upon registration.— Denunciation at the market cross of Edinburgh, where the debtor dwells not, tho' sufficient for caption, yet not for annualrent. Stair, 26. Jan. 1665, Hutchison. Fount. Forb. 17. July 1711, Gordon. Nov. 1733, Dunbar. Remark. Dec. p. 390, Home, p. 390, Cochran. 7. July 1743.—The contrary was found. Fount. 11. Dec. 1686; And the reason given, is the debtor's contumacy, which still takes place when ever he is denounced.

A CHARGE and denunciation having passed upon a decreet, which was thereafter suspended, and restricted to a lesser sum; annualrent was, notwithstanding found due of the restricted sum, denunciation having passed. Stair, 30. Jan. 1663, Rigg.—An executor found not liable in any annualrent due by the defunct, the time of his decease, upon denunciation, without paction. Auchinleck, (*intromission*), Douglas.—But the heir found liable. Dur. 8. July 1642, Huntly. Private banking companies not paying their notes, are liable for interest and costs of suit. Fac. Col. v. III. p. 160, Trotter. 17. Dec. 1761.—In this case damages were, after the interlocutor, insisted for, but before judgment, the parties entered into a submission.

Annualrent allowed, not simply *ex more debitoris*, but *nomine damni*.

ANNUALRENT found due to a merchant from the term of payment specified in a missive letter, tho' not promising annualrent; but the random expence decreed for in a decreet of constitution, was not allowed. Fac. Col. v. I. p. 321. Creditors of Frakesfield, 14. Dec. 1756.—Interest found due, *nomine damni*, in a debt payable on demand, from the citation against the debtor in an action for payment. Fac. Col. v. II. p. 303. Moncrief. 13. Dec. 1751; and where no term of payment is stipulated, *ex. gr.* in an open account, decreet is generally awarded for the interest at the time at which the account ought regularly to have been paid, *viz.* after the elapsing of a year from the date of the last article. 25. Jan. 1754, Grant.

Due by Tutors and Curators.

TUTORS and curators have a year after admission, to uplift and re-employ the minor's sums, not bearing annualrent, after which they are liable for annualrent. Stair, 9. July 1667, Steven.—And therefore, must uplift and employ annualrents due before the tutory, within a year after acceptance. Stair, 27. Feb. 1673, Douglas. Fount. 16. Jan. 1696, Irvine and Oliphant.—As to mails and duties of lands and other rents, tutors and curators are accountable for the annualrent thereof, within a year after they are payable; this, *laxamentum temporis*, is allowed to find hands for lending out their pupil's money. Fount. 20. Nov. 1678, Hay. Fount. 16. Jan. 1696, Irvine and Oliphant.—The like, as to the annualrent of goods roused, *durante tutela*. Fount. 20. Nov. 1683, Wilson. As for annualrent of sums falling due, *pendente tutela*, they are not to be accumulated into a principal sum, to bear interest, but once during the tutory; so that tutors are only accountable for the *usura usuarum* of such, *post finitam tutelam*. Stair, 27. Jan. 1665, Kintore. Fount. 20. Nov. 1678, Hay. Fount. Falk. 18. March 1684, Lockhart. Observed by Sir Patrick Home, Dec. 1682, Fount. 16. Jan. 1696, Irvine and Oliphant.—The Lords found a tutor must pay annualrent for victual-rent and house-mails, within a year after they are due, and made no difference betwixt country-rents and town-rents, tho' the cash is sooner got in, and found him not liable for the annualrent of annualrent of sums of money, till after the expiring of the tutory, for which there is no equity but there custom. Fount. 2. Dec. 1679, Hamilton.—But a tutor was freed from this obligation, having died two years before expiration of the tutory, in which time, he might have both uplifted the annualrents and re-employed them. Stair, 4. July 1665, Kintore.—The Lords found this difference betwixt tutory and curatory, with respect to annualrent of the minor's annualrents, *viz.* that altho' tutors *semel in tutela*, must employ what is over the pupil's aliment upon annualrent, and so leave it, bearing annualrent; yet that a curator was not at all obliged to this, because, *finita tutela*, the minor continues still weak, and may neglect to call the tutor to an account of his administration,

nistration, whereas, *finita cura*, the minor is *sciens et prudens*, and may immediately convene the curator. Home, Nov. 1686, Inglis and Charteris. Fount 10. July 1688, Willson.

A TUTOR found liable for the annualrent of his pupil's money, uplifted by him, whether heritable or moveable, not only till the expiration of his office, but till the real payment, even after he had intented an action, *contraria tutela*, in order to have his accounts cleared, and to pay his balance. Dur. 18. March 1628, Nasmith.

A TUTOR uplifting some of his pupil's money, and dying soon thereafter, before he had opportunity to lay it out upon interest; his heir, an infant, at the time of intromission, was found liable only for the annualrent after intending the cause, the pursuer having been silent twenty-five years. Dur. 22. Feb. 1634, Davidson — Otherwise, where the tutor uplifted a sum, bearing interest, and gave his bond to make the same forthcoming to his pupil; for, if he took the money in loan, he was liable for interest; and, if it once bore interest in his person, it could never cease in the person of his heir, tho' a minor. Dur. Spot. (tutor) 24. Feb. 1627, Guthrie. — A tutor is neither obliged to uplift the annualrent of his pupil, nor give them out upon interest, the debtors being responsal, but only once betwixt and the end of pupilarity. Stair, Goss. 9. July 1669, Kintore.

N. B. *This was stopped to be further heard.*

CURATORS receiving the minor's money, two or three months after a term, which had been assigned by the debtor at the term, and, by occasion of the dependence of a process, had not been given up till the time foresaid, were not made to account for that term's profit, unless it could be verified, that they had employed the money, and received profit for it the same term. Dur. 1. March 1627, Guthrie.

A TUTOR who was cautioner for a sum payable to his pupil, at the principal debtor's death, being pursued for the same by the minor and her curators, after the tutory expired, was found liable for annualrent after the term of payment, on account of his negligence in not making due payment, altho' the bond bore no annualrent,

nualrent, and that it was alledged, he never was inter-
pelled, and by the principal party's insolvency, he could
have no relief; but the Lords found; that from the expi-
ration of the tutory, till the time he was charged by the
minor, he was not liable in annualrent. Hope, (tutor)
Dur. 1. July 1625, Goldman.

THE Lords found a pro-tutor liable in the annual-
rent of money intromitted with by him, as a tutor
would have been. Dur. 5. July 1637, M'Duff. Dur.
17. July, Spot. (tutor) 21. July, Auchinleck, (tutor)
July 1630, Vallanges.

Due by Factors.

IN a process, at the instance of creditors on a bank-
rupt estate, against the factor, wherein they craved,
that he might be liable for annualrent, within a year
after the rents fell due, in terms of the act of fede-
runt, ult. July 1690; the Lords found the factor liable
in annualrent, conform to the said act, tho' the for-
tune was small, and the creditors usually applied for
warrants upon the factor for their annualrents, which
he could not quickly answer, unless he were allowed to
keep money in his hands. Fount. 1701, Credi-
tors of Carden.—A factor found liable for interest
upon rents uplifted by him, from the time his constituent
made an extrajudicial demand upon him, by a letter to
clear his accounts. Fac. Col. v. L. p. 61. Campbell,
6. Dec. 1752.

Due by Consignators.

ANNUALRENT being claimed from a consignator,
upon this *medium*, that it was consigned, not as a fun-
gible, but as a *corpus*, and he had lent out the same,
and got annualrent for it, *et accessorium sequitur princi-
pale*; answered, The lending out the money was upon
his own risque, and the party was not concerned in
what shape he kept the money, provided he had it
ready upon a call; the Lords found no annualrent due.
Bruce's MSS. 20. July 1716, Barclay.—Wallace of
Inglisforn, in the year 1713, sold lands to Sir James
Dick,

Dick, and certain incumbrances remaining unpurged, 2000 merks of the price was consigned in Ballandalloch's hands, who gave an obligation to the seller, declaring, *That the money was put in his hands to be expended, in perfecting and completing the rights and diligences affecting the purchase; and therefore, obliging himself to count to the seller for the said sum, and if any overplus remained, after completing the diligence, to pay the same on demand.* In the 1728, Inglishtoun having raised a process against the present Ballandalloch, for recovering the said sum consigned in his father's hands; the Lords found the defender liable for annualrent, as well as principal. Feb. 1728, Wallace.

Due by Executors.

A STRANGER, executor, being pursued by the nearest of kin of the defunct, who were minors, for their share of the inventory given up by the defunct himself; the Lords found him liable to them from the date of the confirmation, for annualrent of sums therein set down, as bearing annualrent, but not for annualrent of other sums, which were not expressed to bear annualrent, tho' it was alledged, that *nammi pupillaris non debent esse onerosi*, &c. Forb. 26. June 1705, Robertson.

—An executor-creditor having confirmed and uplifted sums not bearing annualrent, and having a balance in his hand, after payment of his own debt, which he laid out upon interest; he was found liable to account to the other creditors for the neat balance only, not the profits; because an executor-creditor is not bound like a tutor, to lay out upon interest the sums he uplifts, and if he does it, the risque is his own. July 1730, Creditors of Thomson. —Annualrent not due by an executor, even for sums uplifted by him, bearing interest. Remark. Dec. p. 123. 23. July 1747, Roxberry. Afterwards an executor found liable in interest, for such sums as bore interest at the defunct's death. Fac. Col. v. III. p. 254. Ferguson, June 30. 1763. A legatee is intitled to the interest arising upon his share of the defunct's funds, as well as to the legacy itself. Fac. Col. v. II. p. 143. Arbuthnot. 4. Jan. 1758.

Due

Due by Trustees.

A DEBTOR having conveyed his effects to certain trustees, to be converted into money for the behoof of his creditors, the trustees, in counting with the creditors, were found not liable for annualrent of the sums, that, from time to time, came into their hands, during the course of their management. 4. Jan. 1738, Trustees of Colonel Johnston's creditors.

Due by those who uplift sums bearing Annualrent.

A PARTY having assigned his creditor to a greater sum, owing to himself by bond bearing annualrent, upon the creditor's obliging himself by back-bond, to retrocess the cedent upon his paying the debt, in security whereof the assignation was granted, or to order the debtor in the sum assigned to pay him the surplus, in case the assignee got payment by the assignation; the Lords found the assignee, who uplifted the whole sum, liable to the cedent for the balance, and annualrent thereof, from the term of his uplifting the money. Forb. 22. Dec. 1710, Irvine. — A factor upon a bankrupt estate, having a considerable sum of bygone rents in his hands, bearing interest, the two preferable creditors upon the estate, who had long disputed which of them was to be ranked first in order, apprehensive of the rents perishing, agreed to divide the same in a certain proportion; in consequence of which agreement, application was made to the court, in the name of one of them, with consent of the other, and he having by this means recovered the bygone rents out of the factor's hands; and having been, many years hereafter, pursued by the other creditor upon the agreement, he was obliged to repete the pursuer's proportion of the rents, with interest from the time of uplifting. 18. Feb. 1736, Colonel Erskine.

Due by those who are *lucrati*, as having had the use of other people's money.

MONEY being due as the price of land, bears interest

rest from the time the purchaser attains possession, tho' not stipulated in the contract, being *lucratus* by the rents of the land. Spot. (*usury*) 7. Feb. 1628, Home.

—The like, tho' the money was arrested in the purchaser's hands, and so could not be said to be in *culpa* or *mora*. Dur. 17. Feb. 1624, Durie. —The like, tho' the seller was in *mora*, not having delivered a sufficient progress. Stair, 28. Jan. 1663, Balmagowan.

—The purchaser was allowed his option, when the seller was in *mora*, either to pay annualrent to the seller, or to account to him for the rents of the land. Dur. 8. March 1627, Stirling. 10. July 1626, Clunie. —Annualrent found due, not only for the price of lands, the buyer having possessed the same, but

also for the price of a discharge of the reversion of the lands. Auchinleck, (*annualrent*) 17. Dec. 1628, Laury.

—The Lords found, That tho' a minute of sale of lands mentioned no annualrent, yet the price must bear interest from the date of the minute *ex natura rei*, without paction, tho' the purchasers were in possession of the lands, disposed by the minute, many years before the same, by virtue of wadsets and other rights. Fount.

23. Feb. 1684, Nithsdale. —The granter of a bond, for the price of a liferent, affecting lands purchased by him, was found liable for the annualrent thereof, from his entry to the possession of the lands, altho' the bond bore the principal sum to be payable only at the first term of Whitsunday or Martinmas, after the purchaser's right should be ratified by some persons having interest to quarrel the sale, with annualrent after the said term, and made no mention of annualrent before. Forb. 23. July 1707, Baillie.

A PURCHASER of salt, having accepted a bill for the price, which he was obliged to pay to an indorser upon distress, was found intitled to the annualrent of his money, from the time he paid the same until delivery of the salt, the seller having been in *mora*. Bruce 8. Dec. 1714, Lesly.

ANNUALRENTS not due *in condictione indebiti*. Auchinleck, (*annualrent*) 25. Jan. 1628, Houston. —Yet a *condictio indebiti*, tho' the Lords would not allow annualrent, they decerned the defender in a considerable sum, in name of damage, which was near equivalent

Gosf. 5. July 1677, Gray. Fount. 30. July 1678, Blair.
—Found, That money, *bona fide* uplifted, is to be re-
stored without interest, tho' the money belongs to a *mi-*
nor. Falc. 9. March 1684, Lockhart.

**Due to Cautioners, Mandatars, &c. as a re-
compence for advancing their own mo-
ney upon the Constituent's account.**

BEFORE the act of sederunt 1590, no annualrent
was allowed to a cautioner for the sums he paid out
upon the principal debtor's account, where the bond
carried none. Nicolson, (*annualrent*) 15. Nov. 1627,
Dick.—A cautioner, who, upon distress, pays the debt,
has right to annualrent of annualrents paid by him for
the principal debtor, from the time of the payment.
Stair, 7. Feb. 1662, Lockerbie. Forb. 27. June 1706,
M'Micken.—The act of sederunt, allowing cau-
tioners annualrent for the whole sums paid out by them,
extends to a debtor, bound conjunctly and severally,
who has a bond of relief from the other co-obligant.
Dur. 15. Nov. 1627, Black.—The said act was ex-
tended against the executors and representatives of the
principal debtor. Dur. 12. July 1628, Moristoun.—
A cautioner having paid annualrent without legal dis-
tress; the Lords found, that he had no right to crave
annualrent of the said annualrent, the payment having
been voluntary: Yet they modified as much of the
penalty as near came to the half of the annualrents,
Gosf. 18. July 1668, Stewart.

ELAPSING of the term of payment, and registra-
tion of the bond, sufficient distress to intitle the cautioner
to claim annualrent of the sums he paid out for the prin-
cipal debtor. Dur. 24. Jan. 1627, Wauchton, Spot.
(*usury*) 16. Jan. 1627, Cranston.

A SUM being advanced, by the managers of a per-
son of quality's estate, to one of his Lordship's friends,
who, by advice of other relations of the family, went
abroad, to acquaint him with the state of his affairs,
and to solicit his coming home; the Lords found
the master himself, after his home-coming, bound to
allow the money so advanced, tho' the friend's jour-
ney proved, at that time, ineffectual; but refused to

allow annualrent. Bruce, 1. Dec. 1714, Smith's children. — The Lords refused to find annualrent due to an heritor, insisting against other heritors for relief of their proportions of a glebe designed to the minister, there being here neither *pactum* nor *morea*, since it was the pursuer's fault that he did not insist sooner. Gosh. 6. Dirl. 7. June 1676, Stenhope — Found, That an answered letter of credit, with the possessor's receipt thereon, did bear annualrent, like a bill of exchange, from the time of the advancing the money. Hare (*Bills of exchange*). March 1682, Falconer. When a tutor pays out a sum of his own for his pupil's affairs, he ought to have allowance of annualrent, till the time he had, or might get in the pupil's annualrents. Hare (*Tutors and curators*). March 1683, Murray and his Lady. — A factor allowed annualrent for his several advances upon his constituent's account, from their respective dates, according to l. 12. § 9. *Mandat*. Dec. 1726, Aubray and Cullen factors in London.

If due to Creditors upon a bankrupt estate after a sale.

AFTER a sale before the Lords of a bankrupt estate, a creditor, whose debt did not bear annualrent, and who had not adjudged, was preferred upon an inhibition; and, in virtue of that preference, insisted, not only for a proportion of the price effecting to his sum, but also for the annualrents of that proportion as accessory, arising due since the decret of sale; the Lords found he had no claim but for payment of his sum without annualrent, seeing his debt bore none. Forb. 25. June 1713, Carmichael.

Annualrent allowed *ob favorem*.

A LEGACY being left to a bastard daughter, the one half payable at her marriage, the other at the death of the testator's wife; the Lords considering that the one term was in the legator's own power, and that it was unfavorable to put her to the necessity of marrying, sustained annualrent for that half, but not for the other. Stair, 25. June 1664, Inglis.

AN heir of entail, being bound to pay to the heirs-female, a sum at their perfect age, was decerned to pay the annualrent thereof, after they were past 12 years old, tho' not mentioned. Colvil, Colquhouns.

MONEY left in testament to the poor, found to bear annualrent from the death of the testator. Erskine, 4. March 1624, Minister of North Berwick.—Contrary found, Fount. 5. July 1700, Poor of Cardross parish. Yet if the executor, either makes use of the money, or be in *mora*, by not giving to the legators timely advertisement of the legacy left them, in either of these cases he will be liable. *Ibid.*—Provision to a child, found to bear annualrent from the first term after the father's death, tho' the same was only payable in the event of an impossible condition. Home, p. 302, Forrest, 1. Dec. 1741.—Annualrent found due to children, on a provision in a contract of marriage, from the first term after their father's death, in respect the father was bound to employ annualrent. Fac. Col. v. l. p. 19. Oughterlonies, 12. June 1752.

THE Lords found in general, that notwithstanding the disposition of the Roman law, annualrent for tocher is not due by our custom, unless expressly so provided. Dirl. 20. Dec. 1676, Carnegie. Dur. 23. March 1624, Hamilton.

What puts a stop to the course of Annualrent.

A BOND, heritable by stipulation for annualrent, being payable upon a simple charge, it was doubted, if the charge, which made the sum simply moveable, did not make the annualrent cease. The Lords did what was equivalent; they decerned for as much of the penalty as made up the annualrents for all terms since the charge. Dur. 25. July 1626, Austine —A debtor, upon a relevant reason of suspension, having consigned a sum due by bond, bearing interest, and thereafter, for more security, having uplifted the same, in respect he was liable for the hazard of consignment; the Lords found, that this did not stop the course of interest without regarding whether he might profit or not. Stair, 14. Jan. 1668, M'Pherson.

Annualrent in some cases not due.

NOT due on a bill by a wife for furnishings. *Falc.* v. II. p. 115, *Forrest*, 24. Nov. 1749.—A father intronitting with an infant son's effects, as administrator in law, is not liable for annualrent. *Home*, p. 47. *Vanse*, 29. June 1736.—A cautioner for a factor not liable for annualrent, none being found by the decreet obtained against the principal and him, tho' claimed in the summons, and no diligence used by horning and denunciation. *Fac. Col.* v. II. p. 367. *Gordon*, 2. Jan. 1760.

Annualrent, infestment of.

ANNUALRENTS of old had no effect, but by pointing of the ground, and produced no personal action for maills and duties. *Dur.* 24. March 1626, *Gray*.—But afterwards, arrestment of maills and duties was sustained, laid on in the tenant's hands, upon the foundation of the annualrent-right. *Dur.* 20. July 1633, *Annandale*.—And more directly, a personal action was sustained by the Lords, upon a right of annualrent, against the tenants, for the maills and duties effeiring to the said annualrent. *Dirl.* 20. Dec. 1676, *Ker*.—And an annualrenter, who had a pointing of the ground, pursuing the tenant personally after his removal from the ground, the same was sustained. *Goss.* 1. Feb. 1670, *Wilson*.—Which personal action was extended against all intronitters with the maills and duties. *Dur.* 15. March 1637, *Guthrie*. But, in this case, a pointing of the ground had preceded.—See also, upon this point, *Dur.* 15. July 1629, *Hamilton*.—An infestment of annualrent is not a sufficient title to pursue a personal action for maills and duties, unless an assignation to the maills and duties be contained in the annualrent-right. But an annualrenter, after obtaining a decreet of pointing the ground, finding her diligence disappointed, by the goods being privately carried off the ground; the Lords, in a new process

process for maills and duties, found the tenant liable personally for the maills and duties, to the extent of the goods that were upon the ground at the time of the citation in the poinding of the ground; because the subject was thereby rendered litigious. Fount. 5. July. 1701, Kinloch.

An annual renter cannot remove tenants.

AN annualrenter cannot remove tenants, nor does the infestment bar the heritor from setting new tacks. Dur. 9. March 1630, Auld.

A RENUNCIATION found not sufficient to extinguish an annualrent-right established

Annualrent, how extinguished?

by charter and sasine, in prejudice of a singular successor, thereafter acquiring right from the annualrenter. Dur. 23. Nov. 1627, Dunbar.—But a re-

gistred renunciation, without necessity of resignation, extinguishes infestment of annualrent, *quoad omnes effectus*, even against a singular successor. Fount. 2. Jan. 1705, Heirs of Learmont. Stair, 7. Jan. 1680, M'Lellan.

DISCHARGE of annualrent effectual against a singular successor, by apprising, in the infestment of annualrent. Stair, 7. Jan. 1680, M'Lellan.—In an infestment of annualrent, constituted after the new form, as an accessory security to the principal personal obligation; payment of the principal sum, obtained by poinding of the ground, was found effectual against a singular successor in the annualrent, without renunciation. Stair, 8. July 1680, Rankin.

A CREDITOR in an infestment of annualrent, conveyed the same by assignation, but, before intimation or infestment by the assignee, having discharged the same to the debtor upon payment; this discharge was found *funditus* to extinguish the infestment; even in prejudice of the assignee, so as in a competition to prefer a creditor, whose infestment was posterior to that of the assignee's. Forb. MSS. 8. June 1714, M'Doual.

A CREDITOR by an heritable bond granted a partial discharge and renunciation, which he afterwards retired on a further advance of money; it having never been registred, and there being no intervening real rights, the infestment was found to subsist for the whole annualrent. Falc. v. l. p. 103, Campbell 19. June 1745.

INFESTMENT

INFEETMENT of annualrent preferred in a competition before arrestments. Rem. Dec. p. 163, Kilhead, 2. Nov. 1748.

REQUISITION, or charge, when requisite, in order to diligence. See legal diligence.

AFTER diligence by adjudication, &c. If the annual-renter can recur to his real right. See right in security.

ANNUALRENTER uplissing more than his annual-rents, if the surplus will impute in payment of his principal. See payment.

A P P E A L,

FROM the Lords of session, to the parliament of Scotland, whether effectual. Stair, 5. Feb. 1674, Dunfermline.

IN a competition betwixt a lady, who stood inest for her jointure, and a creditor, who had arrested in the tenants hands, for crops 1707 and 1708; the lady having appealed, and the appeal being received in the House of Peers, and execution by their writ of *certiorari* sisted thereupon, and now the creditor having arrested for the crop 1709, and insisting on a forthcoming, *super iisdem mediis*, the Lords found, that the former appeal could not extend to this case, being for another year, and could neither stop procedure nor execution, till the House of Peers should interpose their authority, which they had not done to this new process. Fount. 19. July 1710, Lyon and assignee.—Mr. Archibald Muir, minister, having been deposed by the synod of Lothian, the sentence appealed, and affirmed by the next Assembly; the Lords found that the sentence of the assembly behoved to operate *retro* from the date of the sentence affirmed, and that Mr Muir ceased to have any claim for stipend, from that time, notwithstanding the appeal. July 1723, Muir.

A P P R E N T I C E.

A SURGEON's apprentice having been bound for four years, and his master dying at the end of the first two, and being unwilling to accept of the offer made by the

he relict to entertain him still at bed and board, and keep
man, who had past his apprenticeship, to instruct him,
and having pursued her on the passive titles, for repetition
of half of the fee, with the annual rent thereof; the Lords
found a recompence due to the apprentice, in the event
of the master's death, during the currency, but did
not think it should be divided equally, *pro rata temporis*,
seeing the master could have little benefit by his ap-
prentice's service during the two years it stood; and
therefore refused to sustain the repetition for the half,
but only for a third of the apprentice-fee; and sustain-
ed this answer, That she offered to instruct him, by a man
who had past his apprenticeship, and that he refused.
Fount. 17. Feb. 1711, Cutler.——A cautioner for an
apprentice being charged, upon an indenture, for damag-
es, upon account of the apprentice's running away; it
was found relevant, that the cautioner offered him back
within two or three days. Fount. 17. Dec. 1686,
Mallenier.

IT being objected against indentures between a ma-
ster and his apprentice, that they were null by the sta-
tute 8vo. *Anna*, imposing a duty upon sums stipulated
by indentures, in regard that, contrary to that statute,
five guineas had been paid to the master's wife, more
than the apprentice fee inserted in the indentures; the
Lords found it relevant to annul the indentures, that
the compliment to the wife was contracted or agreed
for, at or before signing the indentures; and also
found it relevant, that the compliment was given, with
the Master's knowledge, after signing the indentures, and
before tendering the duty, tho' not previously bargain-
ed for. 20. Jan. 1727, Horseburgh.

A GUINEA being covenanted and paid to a master's
wife, which was not inserted in the indentures, it
was found that the forfeiture, by the statute 8vo. *An-*
na, was double the sum received, recoverable on-
ly in exchequer; that the indentures could yield no ac-
tion; and that there was no repetition competent to the
pursuer of the sum in the indentures. Home, p. 128.
Gadboll, 10. Jan. 1738.——A master can reclaim his
apprentice if he insists. Home, p. 329. Wright, 29.
June 1742..

NO

NO action lies upon a bill accepted for payment of an apprentice-fee, the indenture, which was the cause of granting the bill, being void by 8vo. *Anna.* Fac. Col. v. I. p. 146. Donaldson, 14. Feb. 1754.

DAMAGES awarded upon an indenture, against the cautioners of an apprentice, who had voluntarily insisted. Fac. Col. v. II. p. 196. Sibbald, 21. June 1758.

A BILL granted for an apprentice-fee, not reduced, tho' the principal indenture was not stamped, nor the sum inserted therein, the master, after the apprentice's death, having subjoined the sum to an extract, and got it stamped on payment of the duty. Fac. Col. v. II. p. 498. Shepherd, 19. Nov. 1760.—Tho' the apprentice die before expiration of the indenture, the whole fee is exigible. *ibidem.*

Approbate and Reprobate.

FOUND, That a party might lawfully approve, and make use of one part of an instrument for proving his intent, and yet offer to improve another part of the same as false. Maitland, 12. July 1566, Weir.—Found That a party might found on the concession and acknowledgment, in a paper granted by the contrary party, and, at the same time, deny the other facts which make against him, alledged in the same paper. Bruce, 22. July. 1715, Home.

A THIRD party was allowed to approbate one clause of a writ in his favor, and to reprobate the rest. Stair, 23. June 1671, Ballagan.

IF tutors acquire real rights in favor of their pupil and clog them with unjust and undue substitutions, the pupil may get the substitutions (by which they or their heirs are leased) to be declared null, and yet have the benefit of the real right. Fount. 17. Nov. 1703, Grant and Somervell.—A person whose estate, in his contract of marriage, was provided to the heirs of the marriage did thereafter, in implement of the contract, dispose his estate to his eldest son, but reserved to himself power to alter at his pleasure. The eldest son having died infest, and his relict claiming a terce, it was objected by a second son of the marriage, to whom the father, in virtue of the reservation, had gratuitously dis-

posed

ioned the estate, after the eldest son's death, that the eldest son's infestment, upon which the pursuer's claim was founded, was evacuated by the conveyance in his favor; and that, if the pursuer did plead upon her husband's right, she must take it as it stands. Answered, The reservation must be held, *pro non adjecto*, being repugnant to the limitation in the contract of marriage; and the pursuer's husband had never accepted of the disposition, to tie him down to the unreasonable condition. The Lords found the pursuer might plead upon her husband's infestment, and yet impugn the reservation therein contained, as being gratuitous, and in prejudice of the contract of marriage. 26. Jan. 1731, Fea. A question occurred, Whether one who had succumb'd in the reduction of a writ, wherein he had a partial interest, could afterwards recur to the writ, and take the benefit thereof? The objection was sustained. Stair, 21. Dec. 1680, Anderson. But afterwards repelled. Jan. 1727. Miln.

BY a disposition in favor of an eldest son, he is taken bound to pay the father's debts contained in a list, one article of which was 11,000 merks, in name of provision to the younger children; and it is declared, that he is to be no further liable to any of the father's engagements. The younger children not knowing of any other provision, insisted against their brother for 11,000 merks, and obtained payment; but thereafter, finding a greater sum provided to them in their father's contract of marriage, they insisted against their brother for the balance, as liable *præceptione hereditatis*; the Lords found, That the younger children having founded upon the disposition as their active title, and as containing a burden and provision in their favor, they cannot now insist to make the defender further liable, contrary to the express terms of the disposition. Dalr. 8. Dec. 1703. Allan.

A LEGACY of a right to lands, is effectual against the testator's heir, who takes benefit from the testament in which the legacy is given. Fac. Col. v. II. p. 155, Cunningham, 17. Jan. 1758.

ARBITRATION.

FOUND, That arbiters cannot decern for a penalty, other or greater than is contained in the submission; and, for this reason, a decret-arbitral, in which a greater sum was decerned, in name of penalty, was restricted *quoad excessum*. 24. Feb. 1739.

Power of arbiters.

Creditors of Boquhan — Arbiters cannot decern their decreets to take effect by summar-diligence, unless the parties submitters interpose their consent thereto. Forb. 12. March 1707, Knox.

ONE of the parties submitters, craving, by bill to the Lords, that they would compel the arbiter, who had accepted, to meet and determine; the Lords declared, That if there had been a clause of registration, he might have been charged with horning, to meet and determine; but, that being omitted, they refused to supply the defect. Fount. 30. June 1699, Chiesly. — A landlord, insisting for diligence upon a decret obtained against his tenant, it was objected, That the decret stands submitted. Answered, One of the arbiters has renounced the submission, by writ under his hand. The Lords found, That an arbiter cannot renounce a submission, seeing he can be charged with horning to determine: And this, tho' it was alledged the tenant had no view in the submission, but to gain time, in order to dilapidate his effects; as to which, the Lords found, they could give no remedy, and that the party ought to have been upon his guard when he entered into the submission. Fount. 8. Feb. 1704, Cairncross.

Arbiters may be compelled to determine.

TWO arbiters in a submission, did, by bill, obtain warrant from the Lords to summon witnesses in relation to the submission, to compear and depone before them. Stair, 6. Jan. 1670, Ker and Scott supplicants. — A cause being in dependence before arbiters, the Lords, upon supplication of one of the parties, granted diligence, by horning, to cause third parties, in whose hands there were papers that were necessary for instructing

Summoning of witnesses.

instructing

structing his claim, to exhibit them. Fount. 26. June 1696, Stevenson supplicant.

A SUBMISSION, blank in the endurance, lasts but for a year. Stair, 23. Feb. 1672, Wallace.—An arbiter may determine, at any time, even after year and day of the date of the submission, bearing no time within which he should determine, provided the parties submitters be alive at the time of the decree. Dur. 25. Feb. 1630, Maxwell.—A submission bearing no day, betwixt and which the arbiters should determine, expires after year and day; and is not like a bond obliging parties to submit, which doth not so expire. Gilmore, Feb. 1665, Menzies.—A bond, wherein a man submitted himself to the determination of certain persons therein named, was found to last during the lifetime of the judges. Hadd. March 1593. The like, Stair, 3. Feb. 1669, Boswell.—A submission was sustained, wherein the judges were impowered to decide when they thought proper; and was found to endure as long as they pleased. Hope. (arbiter) 6. July 1610, Johnston.—A decret-arbitral was sustained, tho' pronounced after the year; because the submission contained also a bond, whereby the parties gave power to the judges to determine what proportion of the goods in controversy should be given to a third party concerned, and contained no day nor blank. In this case an objection was over-ruled; that the third party was abroad at the time the submission was entered into, was minor, and did not sign the same, and that no person took burden for him, in respect he claimed the benefit of the submission. Dur. 14. March 1639, Hepburn.

A DECRET-arbitral was found null, subscribed after the submission was expired, tho' pronounced within the time. Stair, 2. Dec. 1680, Pitcairn. Hadd. penult, Jan. 1608, Hamilton. Fount, 18. Nov. 1696, Watson.—The Lords reduced a decret-arbitral, because some of the arbiters had subscribed it after the time limited, tho' others had signed before it elapsed, and all of them had given command, before elapsing, to fill up the blank in the terms concerted. Newb. 23. Feb. 1666, Freeland.

—A decreet-arbitral sustained, tho' pronounced *in ipso termino*, i. e. upon the very day betwixt and which it was to be pronounced. Hope, (*Arbiter*) 21, Dec. 1614, Monteith, Fount. 30. June 1694, Wilson. —A minute of a decreet-arbitral being wrote, tho' not in form on a paper apart, and signed by the judges within the days appointed to decern, and intimated *debite tempore* to both parties; the Lords found, that, even after the day was elapsed, the judges might insert their decreet-arbitral, formally extended, in the blank on the back of the submission, always keeping the substance of the said minute, and inserting no other thing material, but what was therein contained. Dur. 27. March 1633, Forrester. Dur. 2. March 1636, Altar. Fount. 4. Jan. 1699, Earl Crawford. —Arbiters may ordain all writs in implement and prosecution of their decreet, to be extended at their sight, after expiring of the submission. Forb. MSS. 30. July 1714, Erskine.

FOUND, That where a submission gives power to decern before such a day, and in case of *Oversman*. variance, the oversman to decern after that day, if he decern before the first day, his decreet is null. Hadd. Hope, (*Arbiter*) 1. Jan. 1612, Campbell. —A decreet-arbitral pronounced by an oversman, found null, in respect it did not bear that the arbiters had varied, without which the oversman could not interpose, Dalr. 30. Nov. 1716, Gordon.

IT being objected against a decreet-arbitral, That the party was decerned in 5000 marks without mentioning any cause, or producing any thing to instruct that he was at all debtor; the Lords found the decreet null, unless the cause thereof could be proven. Stair, 23. Feb. 1672, Wallace. —Decreet-arbitral used of old to be reduced for enorm lesion, if bribery was not alledged. Balfour, (*Arbitration*) 1. March 1541, Black. —A decreet-arbitral being suspended, upon an alledgance, that some facts mentioned in the decreet, as the foundation of the decerniture, were utterly false, which were offered to be proven by the oath of the arbiters; the Lords refused to sustain this as a reason of suspension; tho' it was urged, that the suspension was founded in the very words of the regulations 1692 allowing

Following decreets-arbitral to be called in question, upon the head of *corruption, bribery and falsehood, alledged against the judges arbiters who pronounced the same*; where the word *falsehood*, being directed personally against the judges arbiters, cannot be understood in any other sense, than their pronouncing decret-arbitral upon false suggestions. 18. Dec. 1724, Hardie.—In a reduction of a decret-arbitral, in which gross iniquity was alledged; and that, during the dependence of the submission, the arbiter had accepted of a gratuitous assignation from one of the parties: the Lords found, that the arbiter could not warrantably accept of a gratuity during the currency of the submission; and that the assignation, bearing a sum of money instantly delivered, could not be constructed to be granted for payment or security of the debts, condescended on by the arbiter, to be owing to him by the cedent: unless there had been a back-bond, or discharge, or some other document, execute at the time of the assignation, declaring the true cause. Dalr. 14. Jan. 1715, Mitchell.—Arbiters, who, by the submission had a power of prorogation, having signed their decret-arbitral, refused to give the same out to the parties, until they were paid for their labour and pains, and continued the submission current by prorogations, until that should be done. One of the parties who judged the decret beneficial to him, paid the sum demanded, and got the decret put into the register. In a reduction of the decret by the other party concerned, the Lords found this reason of reduction relevant and proven, that the decret-arbitral was obtained by bribery and corruption; and, therefore, reduced the same; and ordained the arbiters to pay, into the clerk to the process, the sum received by them, to be bestowed on charitable uses. 12. Jan. 1738, Blair.

SOLEMNITIES of submissions, and decreets-arbitral, to make them bear faith. See *Writ*.

ARBITERS named jointly. See *Solidum et pro rata*.

ARBITERS determining in some articles, leaving others open. See *Indivisible*.

CHARGE upon a decret-arbitral, upon what number of days. See *Inductio legales*.

GENERAL *submission, what it imports.* See *General submission.*

Arbitrium boni viri.

MODIFICATION of an aliment being pursued by a lady against her husband who was out of the country, founded on a contract made betwixt them, whereby he was obliged to pay to her such sums as the friends therein named should modify; and these friends being dead or absent the Lords sustained her action, and found, that the modification came in their own hands, as in *arbitrio boni viri*. Dur. 23. July 1629, Buchanan.—In a question touching the import of a tack of tiends set by a minister, to endure for his life, and for blank years thereafter, the Lords, observing that the blank was scored, thought that it could not now be supplied nor filled up, and therefore found the tack expired with the life of the setter. Fount. 22. July 1696, Lumisden.—Found, That the Court might determine the quantity of a legacy *collatum in arbitrium tertii*, according to the deceased's estate, and circumstances of the person, after the third party's death, or refusal to declare it. Hart. (*Legacy*). Jan. 1684, Shiel.—Marriage being free, was found not to annul a bond of provision by a father to his eldest daughter, "she marrying with his consent, and of those named by him as her curators, otherwise she should only have the sum of blank," which blank was never filled up, the Lords, however, found they might fill it up, if she had transgressed the clause, and thereby restricted the provision, according to the match she made. Stair, 23. Feb. 1681, Hamilton.—A tack being set to a man, his heirs and sub-tenants, whom the setter should be content with, and accept of alienarly, secluding his assignees, and the tacksmen having made a sublet without the heritor's concurrence, the question occurred, What was the import of the above clause? whether it intitled him arbitrarily to withhold his consent; or, if he was obliged to give reasons for his dissent, to be judged of *secundum arbitrium boni viri*? This debated, but not ultimately determined. Feb. 1732, Monkton.—

A gen-

A gentleman having given a bond of provision to his sister for 3000 merks, took a back-bond from her, importing, "That it being rather too great for his circumstances, therefore she consented, that the same should be mitigated by friends, to be chosen *hinc inde*, her mother being always one." After the mother's decease, the brother's creditors insisting for a mitigation, *secundum arbitrium boni viri*, it was answered, that the condition of the mitigation had failed; the mother being now dead; and therefore, the bond must subsist *in totum*, as if this power of restricting had never been; the Lords found there was no arbitrement in this case, and that the bond subsisted *in totum*. 19. Feb. 1734, Corfu. — Colonel Campbell being bound, in his contract of marriage, to secure the sum of 40,000 merks, and the conquest, during the marriage, to himself, and spouse, in conjunct-fee and liferent, and to the bairns to be procreate of the marriage in fee, did by a death-bed deed, settle all upon his eldest son, burdened with the sum of 30,000 merks, to his younger children, to take place in case their mother should give up her claim to the liferent of the conquest, and restrict herself to a lesser jointure, otherwise these provisions to be void; in which event, it was left upon the Duke of Argyle and Earl of Islay, to name such provisions to the children as they should see convenient. The referees having declined to accept of the trust reposed in them; the question occurred betwixt the heir and younger children, Whether their powers were devolved upon the Court of Session, to determine provisions to the younger children *secundum arbitrium boni viri*; or, if the younger children were to be left to the extraordinary remedy of reducing the testament upon the claim they had by the contract of marriage? The Lords found, that the Duke of Argyle and Earl of Islay, having declined to execute the powers vested in them by Colonel Campbell, their powers are not devolved on this court *tanquam boni viri*. 25. Dec. 1739, Campbell.

ALTHO' in a reversion it was provided, that whatever expence should be bestowed upon building, should be refunded at the redemption; yet a building being disproportionate to the smallness of the room, the Lords

modified the expences thereof to a fourth part. Hadd
10. June 1612, Homes.

ARRESTMENT.

*Warrant of ar-
restment.*

UPON a decret of a bailie, a pre-
cept being obtained from the
sheriff for arresting in the hands of
debtors within the shire, the arrestment was found null
in respect it was unwarrantable in a sheriff to interpose
his authority summarily to a bailie's decret, by giving
a precept of arrestment thereon, without citing the
party decerned. Forb. 21. Jan. 1710. Forbis.

A MAN having obtained decret against his debtor,
and thereon raising letters of arrest-
Formalities of ment, and also a summons to make forth-
arrestment. coming, and sending them both to the
country, where they were put in ex-
ecution at once; in the action of forthcoming, this being
alleged to be a no-process, because the process was raised
before the arrestment was laid on, and so was *filius ante pa-
tram*, yet the Lords considered, that the practice had grown
up near to a custom, and that it might occasion the quar-
relling of many diligences, it rejected; and that, in
such cases, *error communis* is allowed *ius facere quoad
preterita*. And that the custom would abridge proces-
ses, and save much expence to the people; therefore
they sustained the summons of forthcoming, and re-
pelled the no-process, notwithstanding the evident incon-
gruity which was down weighed by the conveniency
of the subjects. Fount. 7. Jan. 1704. — *contra* —

Formalities of IN a process of forthcoming, the judge ordained the
decret of arrestee to produce the goods, in or-
forthcoming. der to be roup'd and sold for payment
of the pursuer's debt; this was found
an effectual decret of forthcoming, so
as to bar another creditor, who offer-
ed to poind before any step was taken upon this ordi-
nance, it being pled, that this was the regular method
in forthcoming of goods. Stair, p. 375. and equivalent
to a simple decret of forthcoming where money is ar-
rested, and a certain sum decerned to be made forth-
coming. 17. Feb. 1735, Muirhead.

ARREST.

ARRESTMENT found competent, as well as pouding, upon a bond heritable by an obligor, to pay annualrent, tho' such bonds were not then arrestable. *Upon what debts may arrestment be founded.* Dur. 7. March 1628, Willson. — Arrestment sustain'd, founded upon a personal bond, tho' there was an heritable bond of corroboration granted of the debt; upon which infestment had followed. Fount. 18. Jan. 1695, Fraer. — An heritable bond before infestment, may be the foundation of an arrestment, because such a bond is arrestable. Forb. 17. June 1712, Ker.

A **BOND** of relief in the following terms, obliging the granter to relieve his cautioner, and to retire the creditors bonds, betwixt and a certain day, being, *ad factum prestandum* only, was found no ground for arrestment and forthcoming, even after the day was elapsed. Dalr. 6. Jan. 1702, Blackwood. — The Lords upon a party's supplication found, that a depending process of reduction (which concludes not for the payment of money, but the removing a right out of the way) is not the proper ground of an arrestment, and therefore, ordained an arrestment used upon such a depending reduction, to be loosed without caution or consignation. Forb. 26. Feb. 1712, Ross supplicant.

A **SUM** being payable at a term, and the debtor bound to pay annualrent for the same yearly after that term till payment; this sum, as being heritable, was found not arrestable. *What subjects are arrestable.* Dur. 29. July 1634, Lugton. — But the sum is arrestable before the term of payment. Dur. 29. Jan. 1635, Ker. — And a sum, being destined to be laid out upon annualrent, after a debtors death, was found in the mean time arrestable. — Dur. 20. March 1633, Simpson. — A sum not bearing expressly annualrent, but a certain quantity of victual yearly in place of annualrent, found arrestable. Dur. 24. Nov. 1629, Lindsay.

THE Lords found a bond, made payable at Whitsunday, and which sum was then destinate in the bond to be employed upon land, or annualrent to the creditor, and his heirs male of his body, which failing, to his brother's son, his heirs, &c. to be heritable by destination, and therefore, not arrestable after that term. Hope, (De

(*De Hereditibus*) 14. July 1620, Couper. The contrary found. Dur. 28. June 1637, Galbraith. Found. 11. June 1717, Robertson.

A SUM secured by infestment, being payable at four terms, and the debtor personally bound for the same, the first moiety being arrested in the debtor's hands after the term of payment, but before the debtor was charged to make payment; the Lords found this sum not arrestable. Dur. 16. July 1624, Monimusk.

AN heritable bond whereupon infestment had followed, but not registred in terms of the act of parl. 1673, was found arrestable, and the arrester preferred to the posterior adjudger of the bond, altho' the 60 days, allowed for registration, were not run at the time of the arrestment, so that the arrestment might have been evacuated by registration thereafter. Dalr. Forb. 20. Feb. 1706, Stewart.

A PARTY having led an apprising, the sum thereafter was not found arrestable by the appriser's creditors. Stair, 22. Feb. 1666, Lockhart.

THE question occurred, with regard to a bond due to a married woman, the annualrents of which belonged to her husband, if an arrestment for his debt laid on in the debtor's hands did affect the *jus mariti*, or the annualrents only due at the date of the arrestment; the Lords found, That the arrestment carried no more than the annualrents that were fallen due, and the current term; and the reason given for it was, that arrestment can carry nothing but what is due to the common debtor when it is laid on, not being of the nature of an inhibition to affect *ad querenda*, and that the proper diligence in this case, is, an adjudication against the husband, in whom the *jus mariti* subsists. 19. Jan. 1739, creditors of Clunes. Stair, 27. July 1673, creditors of Scot, competing.

A PARTY having arrested his debtor's share in the African company's stock, in the hands of the directors and cashier, and pursuing a forthcoming, and also repeating a declarator, that the money stood affected by his diligence, and must belong to him, contending, that tho' the capital stock, by act of parl. 1695, is declared free of arrestments, it is otherwise now, the company being dissolved by parliament on payment of the stock

out of the equivalent; the Lords found the company not personally liable, but that the arrestment affected the subject *tanquam nexus realis*, and, tho' they could decern in the forthcoming, yet they only decerned in the declarator, That the share due to the debtor fell to the arrester, and that the directors ought to transfer it over to him; and when the commissioners of the equivalent got the African money paid to them, the arrester had right to claim his debtors share thereof. Fount. 18. March 1707, Alison.

MATTHEW Stewart having some bills payable to himself, sign'd blank indorsations, and gave them to Leckie of Arnmure to be delivered to some of his creditors; before delivery, arrestment was used in Leckie's hands, and a forthcoming insisted in; the Lords found, that exhibition, and not arrestment, was the habile diligence to affect bills thus deposited; and therefore, that Leckie had warrantably given up these bills according to his commission, notwithstanding the arrestment. Dec. 1726, Jamieson.—A bill being indorsed in trust for the behoof of the common debtor, an arrestment laid in the hands of the trustee found effectual to carry the sum in the bill, and therefore was preferred to a second arrestment laid in the trustees hands, after he got payment of the bill, and thereby became debtor in a liquid sum. 13. Feb. 1740, Jones.

TENNANTS being decerned to pay a certain sum to the heritor, in order to be employed for the reparation of a house of his, liferented by a third party; this sum was not found arrestable for the heritor's debt, being designated to a certain purpose, wherein the third party was concerned. Stair, 15. Jan. 1674, Baillie.

IN a forthcoming of a sum consigned for redeeming a wadset upon an arrestment, laid in the consignator's hands, it was considered, that, strictly speaking, consigned money is not the property either of wadsetter or reverser, that the property is *in pendent*, and belongs eventually to the wadsetter or reverser, according as the redemption takes effect or not; and if the redemption take effect, it is understood to have belonged to the wadsetter from the date of the consignment, and therefore, in that event not attachable by the reverser's creditors; Before redemption, indeed, the reverser may pass

pass from his order, and uplift his money; but then this is a personal privilege, which does not transmit to his creditors arresting; the Lords found, That the arrestment does not bar the redemption. 26. June 1739, M'Kenzie.

A MERCHANT, proprietor of a cellar wherein he had some hogheads of tobacco; let *In whose hands* the half of the cellar to a neighbouring merchant, and they had a common key *may arrestment* which sometimes the one, and sometimes the other kept, as their purposes required: At a time when the key happened to be in the tenant's possession, an arrestment was laid in his hands, by a creditor of the proprietor of the cellar, who had his own tobaccos in that half of the cellar which was not set: In a competition betwixt the arrester and a voluntary assignee, whose right was posterior to the arrestment; the Lords found the arrestment an ineffectual diligence, because the arrestee was not custodian of the tobaccos, or in any proper sense a possessor, so as to be liable to any action for delivery, or making forthcoming. 19. Jan. 1733, Hunter.

THE Lords found, That by an arrestment in a debtor's own hands, his whole goods, are so hypothecated, that they cannot be disposed in prejudice of the arrester. Dur. 10. Jan. 1624, Innerweek. Falc. Fount. 10. Nov. 1685, Shaw. Nov. 1687, Gairdem.

A MAN who was debtor to another for the price of some victual, having given a factory to his own wife, who, by virtue thereof, uplifted debts due to her husband, and the creditor both arresting in her hands, and in her husband's, and thereafter transferring the debt after the husband's decease against his heirs *passive*, and pursuing forthcoming against the wife and children; the Lords sustained the arrestment, and ordained the wife to depone what was in her hands at the time, reserving to her to be heard upon any title by which she might crave preference to the pursuer; but found, That the debt must first be constituted; tho' here it was alleged, that arrestment in a debtor's own hand was never before allowed; save once. Fount. 18. July 1766, Home.

AN arrestment was not sustained, because used in the hands of him who was debtor to the common debtor,

debtor, but in the hands of his factor. Hope, (arrestment) Muirhead and M'Michael. — The Lords refused to sustain arrestment in the hands of a factor, to found a process of forthcoming, of debt due by the constituent to the arrester's debtor, tho' the factory was very ample; viz. To uplift, assign, discharge, and dispose of sums, &c. Because, if a decree of forthcoming against a factor, without calling his constituent, was sustained, the constituent's whole estate might, without his knowledge, be evicted out of his factor's hands, and perhaps for debts not truly due. Forb. 18. Jan. 1709, Donaldson.

ARRESTMENT affects the mails of the current term, tho' laid on before they could be demanded from the tenants, because the term running *dies cessit*. Dur. 23. March 1624, Brown, Stair, 28. Gosf. 27. July 1669, Leslie's relict. — And arrestment of the annualrents of an heritable sum, tho' made as well for terms to come as for bygones, was only sustained for bygones and the current annualrents. Dur. 18. Jan. 1628, Halkerton.

— An arrestment being laid upon a wife's annuity, payable out of lands, for a debt due by her husband, who had right to the annuity *jura mariti*, but the arrestment being used before the term, which the fiar of the lands therefore alleged was null, this not being like other arrestments which may be laid on before the term of payment, because there *dies cessit, licet nondum venit*, whereas here *nec cessit nec venit*, there being in this case, no debt at all till the term, since it depended upon the joint lives of the man and wife till the said term came; yet the Lords thought, that the casting such arrestments might lay a foundation to defraud the creditors of life-renters; and therefore, their Lordships sustained the arrestment as valid to affect that current term. Fount. 31. Jan. 1705, Corse. — The like, Forb. 16. June 1705, Hamilton.

ARRESTMENT of the defunct's effects, some months before the common debtor was decerned executor-dative *qua* nearest of kin, was found not validated by the subsequent confirmation; and therefore, an assignation to the subject, after it was established in the common

*If it reaches
adquerenda.*

common debtors person by confirmation, was preferred to the arrestment. Forb. 25. Jan. 1711, Menzies.

ARRESTMENT used after the debtor's death, is not a habile diligence for affecting his goods, and gives no preference in competition with other creditors who proceed by confirmation, or by pursuing the executors. Dur. 26. Feb. 1633, Ruthersford and Turnbull.

Arrestment laid on after the common debtor's death.
IN an arrestment upon a dependence, if the common debtor die before the claim is established against him by decree, the same must be transferred against his representatives; but, if decree be recovered against the common debtor himself, there is no necessity of transferring the same, after his death, against his representatives; the bare calling of them is sufficient to found the arrestment in his action of forthcoming, arrestment falling not by the death of the common debtor, as it does by the death of him in whose hands it is laid. Hadd. 8. March 1610, Dempster. 26. Feb. 1611, Clark. Dur. 17. June 1626, Stirling. Stair, 16. Jan. 1679, Wemyss. Stair, 20. Jan. 1681, Riddel.—Tho' it has been found, That, even where the debt was liquid against the defunct, transference was necessary against his representatives. Dur. 13. March 1628. Somervell, Spot. (*transference*) 26. Feb. 1624, Spittle.—And the Lords once went so far, as to find, That an arrestment being but an inchoat and incompleated diligence, the common debtor deceasing, the sums arrested being in *ejus bonis*, ought to be confirmed; and that the creditor could not have action of forthcoming against the person in whose hands the arrestment was made, but ought to confirm himself executor creditor. Dirl. 6. Dec. 1656, Lesly.

Arrestment, if it dies with the person in whose hands it is laid.
THE Lords, upon a hearing in presence, found, that an arrestment does not die with the person in whose hand it was laid, but may be made effectual against his heir by a forthcoming, the subject being in *medio*; and, upon this footing, preferred an arrestment laid in the deceased's hands,

ands, to an arrestment used against the heir, 22. Dec. 1738, Aberdeen.

AN arrestment having been laid on, and the party to whom the goods pertained, or in whose hands they were arrested, having before the arrestment was ordered, *Breach of Arrestment.*

been loosed, intromitted with the goods, he may be sued for breaking the arrestment, and confiscation of his goods, and punishment of his person; but another party, who had no knowledge of the arrestment, intromitting therewith, can only be sued to make the goods forthcoming. Hadd. 9. July 1611, Wardlaw.

ARRESTMENT, upon a registered bond or decree, is not looseable upon caution, but upon consignation of the principal sum and annualrent, and caution for the penal- *Loosing of Arrestment.*

Stair, 18. June 1675, Hamilton applicant.—Which holds even in a baron bailie's decree. Stair, 23. Dec. 1679, Grieve supplicant.—Also

a decree in absence. Fount. 28. Nov. 1695, Stewart.—Arrestment, upon an unregistered bond, is looseable upon caution. Stair, 7. Feb. 1665, Graham.—

Arrestment, upon a registered contract, was loosed upon caution, the obligation therein being general and illiquid. Forb. 31. July 1705, McFarlane.—Arrestment

for security, before the term of payment of the arresting debt, is looseable upon caution. Stair, Gosf. 4. Nov. 1675, Mosman supplicant. Home 27. Feb. 1728, Meres

and Rowland.—Arrestment, upon a dependence, may be loosed upon caution. Gosf. 19. Dec. 1673, Home.—

And that even after decree has followed upon the dependence. Stair, 9. June 1677, Sibbald.—Arrestment,

upon a decree, was found looseable upon caution, the decree having been suspended before the arrestment. Stair, Dirl. Gosf. 20. Nov. 1675, Warden supplicant.—The contrary had been found, Dirl. 11. June

1675, Scot.—Much more ought the arrestment to be looseable upon caution, the decree being turned into libel. Stair, 30. June 1685, Murray.—But ar-

restment, founded on a decree, is not looseable upon caution, where the decree is suspended after the date of the arrestment. 7. July 1733, Martine.

ARRESTMENT is effectually loosed, tho' the letters of loosing be not intimated to the arrester. Dalr. Forb. 18. July 1707, Crichton.

THE rents of the College of St Andrews being arrested, and it being an incorporation, for which one will not readily be caution, the Lords allowed the arrestment to be loosed, the masters of the college giving a bond binding themselves and their heirs, personally, for what should be uplifted by them, whereby every person stood cautioner for his own intromission, they not being otherwise bound *personaliter*, but only *secundum officium*. Stair, 16. July 1661, College of St Andrews supplicant.

AN arrestment being loosed upon caution, and the sum thereafter assigned, the Lords, notwithstanding, ordained the sum to be made forthcoming to the arrester, and preferred him to the assignee; for they considered, that the caution found in loosing arrestments is overly and insufficient, and therefore would not secure creditors doing diligence by arrestment. Gilmour, 19. Jan. Stair, 7. Feb. 1665, Graham.—Arrestment, on a dependence being loosed upon caution, and the sum arrested thereafter assigned by the common debtor, in a competition betwixt the arrester and assignee, the assignee was preferred, in respect there was no decree extracted upon the arrester's dependence, otherwise the Lords would have preferred the arrester, tho' in arrestment was loosed, as said is, and that without necessity of any new arrestment, the arrested sum still remaining unpaid. Stair, 4. July 1661, Raith.

A CAUTIONER, in loosing of arrestment, was found liable to the arrester, after his debt was constituted, against the common debtor, without further discussion of the persons in whose hands the arrestment was used. Dur. 2. Feb. 1627, Balmerino.

TWO arresters competing in a forthcoming, the last arrestment was preferred, having *Ranking of parata executio*; whereas the prior Arrestments. arrestment was laid on for security of a debt before the term of payment, which was not come at the time of the competition. Stair, 29. July 1670, Charteris. Stair, 17. July 1671.

Lord Pitmedden.—An arrestment, upon a dependence, was preferred to a posterior arrestment upon a registered bond; the dependence being finished by a decree; so that there was *parata executio* at the competition. Forb. 14. June 1710; Brodie.—The like; Bruce's MSS. 31. July 1716, Royston.

ARRESTMENT, laid on before the term of payment of the debt arrested, was preferred to an arrestment laid on after the term of payment. Forb. MSS. 26. Jan. 1714, King. Home, 2. Jan. 1728, Watkins.—The contrary had been determined. Stair 23. Jan. 1673, Mader.

MANY debtors to a bankrupt, being sued by several parties his creditors, to make arrested goods forthcoming, and using all convenient diligence, without great priority, the Lords will ordain the sums to be divided amongst them, in proportion to their debts. Hadd. 18. Dec. 1611, Speir.—The first arrester, with the second decree of forthcoming, is preferable to the second arrester with the first decree. Colvill, Jan. 1583, Wallace.—The Lords preferred an arrester, because he had first arrested, tho' his decree of forthcoming was a day after another arrester; especially because he had a privilege in respect of the nature of his debt, it being for custom and excise. Newb. 10. Jan. 1665, Seaton.—The first arrestment was preferred, the decrees of forthcoming being both upon the same day. Stair, Newb. 1. Feb. 1666, Cunningham. In a competition betwixt two arresters, the Lords preferred the first arrester, tho' the other had obtained a decree of forthcoming, and so had a completed diligence, whereas the other was but inchoated. And this, because the first arrester had intimated action of forthcoming before the Lords, where processes are tedious, and the pursuer not master of the calling, and the other had taken decree in the mean time before a sheriff. Stair, Dirl. 23. Nov. 1667, Montgomery.—A first arrester, who forbore to proceed in diligence, because he obtained, from the common debtor, assignation of the debt arrested, was not excluded upon the pretence of *mora*, but preferred to a posterior arrester who had done exact diligence. Stair, 5. July 1673, Birney.—The like; Jan. 1733, M'Intosh.—Two ar-

resters competing, the Lords preferred the last decree of forthcoming, because the arrestment, on which it proceeded, was a month prior to the other, and the common debtor had made compearance and opposition against him, and suffered the other decree to pass. Fount. 28. Feb. 1680. Robertson.—In a competition among arresters, the Lords preferred him who had the first citation, out-giving, inrolling and decree, in respect of his prior diligence, tho' the arrestments of the other creditors were prior in date, but their summonses for making forthcoming were some weeks posterior to his; for tho' of old (as the author observes) in such a case, the Lords used to bring in arresters, who were not *in mora, pari passu*; yet now their Lordships consider arrestment as an inchoat and incompleated diligence, and like to an assignation unintimated; so that if a posterior arrester get the first decree, which answers to an intimation, he is preferable. Fount. 18. March 1675. Creditors of Clark competing.—One party arresting two days before another, and both obtaining decree of forthcoming in one day; but the goods arrested being delivered up to the second, and he having, *ex abundanti*, caused poind and apprise them in his own hands, the Lords found, That the first arrestment made such a *nexus realis* on the goods (he not having been negligent) that it gave him preference to the second, tho' he first attained possession of the goods. Fount. 15. Jan. 1697, Wightman.—The Lords brought in two arresters *pari passu*, whose arrestments were in one day, not expressing the particular hour; and this, tho' one of them offered to prove, That his copy of arrestment was given some hours before the others, because witnesses may mistake or forget the hour. Forb. 21. June 1705, Suttie.—A debtor in a forthcoming, having made payment, was decerned to pay over again to a prior arrester, who had not obtained decree of forthcoming till after the said payment. Jan. 1724, Nairne. In this case it was also found, That tho' the first arrestment was upon the 3d of March 1721, and the decree of forthcoming not till November 1723, this was not such a *mora* as to prefer the second arrester, who had obtained the first decree of forthcoming.

IN a competition amongst arresters, the Lords found

In general, that arresters are to be preferred according to the priority of their arrestments, and their diligences thereon, although some of the arrestments were laid on before the term of payment of the debt arrested; as also, that they are to be preferred according to the dates of their arrestments and diligences, where the term of payment of the debts, on which the arrestments are used, are past at the time of the competition; notwithstanding, that at the time of laying on the arrestments, the terms of payment of some of the arresters debts were not come, or, notwithstanding some of the arrestments were on dependencies, which were closed, and the debts liquidated before competition. Home, 2. Jan. 1728, competition betwixt Watkins, &c.

IN a competition betwixt two arresters, the one upon a dependence, the other upon a bill of exchange; the Lords preferred the arrestment upon the bill, tho' the bill did not bear *value received*, but only *value in account*, because, such a bill creates a valid obligation, and has *parata institutio*; but found, That the arrester must instruct that he is creditor for the balance, and that his preference is to be restricted to the balance not exceeding the sum in the bill. 13. Feb. 1729, Campbell.

ARRESTMENT may be carried into execution by a process of forthcoming, raised after the death of the principal debtor. Home, *Later decisions*, p. 325. Carmichael, 21. June 1742.

AN executor creditor was preferred to an arrester, who had arrested in the hands of an assignee, before he had received payment, for the surplus, after paying himself, *ibid*.

THE stock of a partner in a trading company, is attachable by arrestment; and an arrestment in the hands of the remaining partners will affect the same, tho' the subjects of their co-partnery were, at the date of the arrestment, abroad, provided these were made good to the company. Home, p. 343. Remark decisions, p. 56. Competition, Rae with Neilson, 19. Nov. 1742.

WHETHER the annual rent of a sum, mortgaged for behoof of a lecturer in a church, is arrestable for his debts; argued, but not determined. Home, p. 376. Hogg, Feb. 1743

AN arrestment, laid in the hands of a purchaser, is preferable to a prior arrestment, laid in the hands of a person employed to sell the goods, and actually selling them, without mention of the name of the owner, and taking a bill for the price, payable to himself. Fac. Col. vol. I. p. 5. Dunlop, 21. Feb. 1752.

AN arrestment, used in the hands of the trustees of the debtor to the common debtor, whereupon decree of forthcoming was then taken against the constituent, was found not good. Fac. Col. vol. I. p. 62. Campbell, 22. Dec. 1752.

ARRESTMENT is effectually loosed on caution tho' the letters of loosing were not intimated to the arrester. Fac. Col. v. I. p. 122, Bannerman supplicant, June 16. 1753.

A PERSON, who was intest in his debtors estate upon an heritable bond, assigned that security to one from whom he borrowed a lesser sum. The apparent heir of the proprietor of the estate brought it to sale, on the act 1695, and arrestments were used in the purchasers hands by the creditors of him who had assigned the heritable bond, in order to affect the annualrents thereof: But he having afterwards conveyed the bond to another creditor, it was found, That the second disponee was preferable to the arresters, as to the reversion of the heritable bond, and annualrents, after payment of the first disponee. Fac. Col. vol. I. p. 233, Ranking of Bonjedburgh's creditors, July 9. 1755.

A POWER from a bankrupt to a trustee to sell his effects, for behoof of his creditors, being executed; arrestment was not found competent in the hands of the trustee, so as to disappoint the *pari passu* preference of the creditors. Fac. Col. vol. I. p. 264. Souper, Jan. 23. 1756.

A WADSET-sum consigned after an order of redemption used, but before decret of declarator, was found not arrestable. Fac. Col. vol. II. p. 181, Cunningham Feb. 15. 1758.

ARRESTMENT used in the hands of one to whom goods are consigned, before they come into his possession, is not good. Fac. Col. vol. II. p. 295, Stalker. Feb. 9. 1759.

THE price of goods sold by a trustee, into whose hands

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hands they had been put, that it might be applied to the payment of creditors, was found not arrestable, *ib.*

NOT competent to arrest grain belonging to a member of a corporation, in the hands of the managers and servants of that corporation, with whom it is lodged in order to be grinded. *Fac. Col. vol. II. p. 452. Cunningham, Nov. 18. 1760.*

ARRESTMENT of goods in lockfast trunks having been loosed, and the goods given up to the common debtor, without inventory or appretiation, the cautioner was found liable to the extent of the debt. *Fac. Col. vol. II. p. 435, McArthur, July 22. 1760.*

AN arrestment used in the hands of a depositary, and one used in the hands of him, to whom the depositary had transferred the natural possession, were found both to be good, but the last preferred, because of priority in time. *Fac. Col. vol. II. p. 471, Competition of Appines creditors, Dec. 10. 1760.*

THE current term of a separate aliment to a wife, is carried by an arrestment used prior to the term of payment. *Fac. Col. vol. III. p. 71. Seton, &c June 16. 1761.*

ARRESTMENT before the term of payment, upon dependence upon a conditional debt, &c. See *Legal diligence.*

ARRESTMENT in security. *Ibid.*

ARRESTMENT upon an obligation not registered. *ib.*

ARRESTMENT makes the subject litigious. See *Litigious.*

ARRESTMENT at the market cross of Edinburgh, pier and shore of Leith. See *Bona fide payment.*

ARRESTMENT *juris dictionis fundandæ gratia.* See *Forum competens.*

See *Compensation.*

ASSIGNATION.

THE cedent is not denuded by his assignation without intimation, and intimation cannot be considered barely as giving preference in competition, but truly as a step of diligence necessary to complete the right in the assignee's person.

Assignation not intimate, denudes not.

Stair,

Stair, 22. Jan. 1663, Wallace.—Therefore, before intimation, the debtor is in safety to make payment to the cedent. Forb. MSS. 8. June 1714, Freugh.—An assignation intimated before the cedent's decease, is sufficient warrant and title to raise letters of horning, poinding, comprising, &c. at the assignee's instance, without transferring the debt or bond registered. Dur. Hope (*Assignation*) 3. Feb. 1634, Craig-miller.—Otherwise, if not intimate during the cedent's life. Dur. 23. Jan. 1624, Stevenson.—An assignee craving, that a process might go on in his name, the cedent, in whose name it was raised, being dead, in regard the assignation was intimated at the market cross before his decease, tho' neither intimated personally, nor judicially produced; the Lords found, That it must be transferred. Fount. 29. Jan. 1687, M'Ilwraith.

THE Lords found the registration of a bond by an assignee, after the creditor the cedent's death, was informal, though the debtor was alive; because registration is a decree of consent, which requires an *actor* and a *reus*; and here the *actor* was dead, and so there could be no decree at his instance; and it was not sufficient that it was done by an assignee, who had not intimated his assignation in the cedent's life; for tho' it be payable to the creditor and his assignee, it is likewise to his heirs and executors; and yet they could not summarily register. Fount. 16. Feb. 1693, Channel. See act 26. parl. 1690.

AN assignation of a reversion, without intimation, alienates not. Colvil, Feb. 1587, Dishington.—And therefore, in double assignments made of the same reversion, he was preferred who first used the order of redemption. Colvil, Dec. 1589, Dishington.—

A tack of teinds being assigned to the heritor himself, the assignation was found effectual, in competition, from the date, it requiring no intimation. Stair, 27. July 1673, Montgomery. The like; Stair, 14. Dec. 1676, Earl of Argyle.—Assignation of a contract of wadset, was found to establish the right in the assignee's person, so as to entitle him, after the cedent's death, to use requisition against the debtor, with-

ASSIGNATION.

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but necessity of any intermediate step of diligence. Dur.
6: March 1639, Urquhart.

A SIMPLE retrocession, without *Simple retrocession*
intimation, evacuates an assignati- *sufficient, where the*
on not intimate. Dirl. 20. Nov. *assignation is not*
Stair, 2. Dec. 1674; Craig. *intimate.*

AN assignee, who had granted a *An assignation*
back-bond of trust, after intimating *in trust being in-*
his assignation, conveyed the same *timated, a convey-*
to the cedent's creditor, with the *ance to the ce-*
cedent's consent. This was found *dent's creditor*
an implement of the trust, and the *needs not be inti-*
right thereby fully established in the *mats de novo.*
creditor's person, for security of
his debt, without necessity of a new

intimation at his instance. Upon which footing he was
preferred to a donatary of the cedent's single escheat,
who had obtained general declarator before intimation
of his right. Forb. 5. Dec. 1712, Smith.

AN assignee may sue in the ce- *Assignee may*
dent's name, even tho' he disclaim *sue in the ce-*
the process. Hope (*Assignation*) 20. *dent's name.*
Nov. 1621, Grior.

AN instrument of intimation of an assignation was re-
jected, because it neither bore the *Formalities of*
clause *de cuius procuratoris mandato* *an instrument*
nihil liquide constabat, nor (which would *of intimation.*
have supplied it) was there any pro-
curatory extant, tho' at the distance

of twenty five, or twenty six years. Colvil, 24. Jan.
1577, Bruce.—In a competition between an arrester
and an assignee, the assignee's intimation was found
null; because, the same person who was procurator,
was also notary thereto. Dur. 3. July 1628, Scot.—

Of two assignees to one sum, the one having first per-
fected his assignation by intimation but the intimation
labouring under some informalities, such as, that it con-
tained not precisely the sum in the assignation, that it
made no mention of the cedent, nor of the date of the as-
signation, nor of the *causa debendi*, but only related to let-
ters of supplement in general; so that it might be applied to
any other right as well as this, not being wrote on the back
of the assignation, but on a paper a-part, though copies
were

were affixed on the market cross, and intimation personally made to the debtor's curators; the Lords found, whatever this intimation might operate against the common debtor, yet, that now, in a competition with a co-assignee, for an onerous cause, it was too general and uncertain; they therefore preferred the other competitor. Fount. 17. June 1696, Laurie.

WHERE intimation is necessary, as a solemnity, the party concerned, though insert as Intimation, by witness in an instrument of intimation, what equivocal was found thereby not to be put in what is not applicable. side, but only by a formal intimation. Colv. June 1586, Mackalzean. The like, where he was made witness to the assignation. Hadd. Nov. 1622, Murray. See also, Hadd. Jan. 1611, Graham. Dur. 15. June 1624, Adamson. Dor. 14. March 1626, Westraw. In all which, private knowledge was not sustained. See also, Fount. 29. Nov. 1679, Bayne, where a letter wrote to the debtor was found not a sufficient intimation. But a letter written by an assignee to the debtor, with his answer, craving days for payment, was sustained as a sufficient intimation, *idque contra tertium cessionarium*. Hope, Spot. (Assignment) Dur. 22. Jan. 1630, McGilgus. — An assignee to a ticket, having first by letter signified his right, and thereafter shewing the debtor the assignation, without any further intimation by a notary, and the debtor, nevertheless, thereafter paying to the cedent; there being here no competition among creditors, but the question only being betwixt the assignee and the debtor, the Lords found the payment unwarrantable, and that it could not defend him against the assignee, tho' no legal intimation was made, there being no co-creditor in the field. Fount. 16. Feb. 1703, Leith. — In a competition between an arrester and assignee; the Lords preferred the former, tho' the assignee alledged, that upon shewing the assignation to the debtor, he had promised payment; but this they found only probable *scriptum* to exclude the arrester; nay, even as to the debtor, they found; That the said promise could not bind him, being made in contemplation of a right supposed to be in the assignee's person, and that being found invalid, it was unreasonable he should pay twice; and here the

Lords

Lords thought, that the assignee *sibi imputet*, had completed his right. Dirl. 11. Dec. 1674, Home. — Found, That a ratification of an assignation by the debtor, was not equivalent to an intimation. Dur. 7. Jan. 1624, Stevenson. — Yet a few weeks thereafter, a debtor, his treating with the assignee several times concerning payment to him as assignee, and offering to him some satisfaction for the debt, was sustained as a sufficient intimation. Durie, *ult.* March 1624, Dunipace. — A communing with a debtor was found not to supply the want of intimation, seeing a promise of payment was not alledged. Dal. 25. July 1718, Faculty of Advocates. — In a competition betwixt a prior assignee and posterior arresters of the same sum, the assignee pled preference upon a private notification given to the debtor's factor, who had accordingly, by a memorandum in his compt-book, mentioned the said assignation; which memorandum was urged equivalent to a formal intimation, as inferring the debtor's knowledge of the conveyance. It was contended on the other hand, by the arresters, *1mo*, That, in point of relevancy, nothing which is extrajudicial can supply an intimation, but what implies the debtor's undertaking an obligation to the assignee. *2do*, In point of proof, that, in competition, the debtor's undertaking such obligation can only be proved by a formal writ, or by the competing arrester's oath of knowledge. *3tio*, An intimation made to a factor was never reckoned equivalent, as if made to the debtor himself. The Lords found, That the private notification made to the factor, and entered in his book, is not equivalent to an intimation to the debtor; and therefore preferred the arresters. 30. July 1729, Earl of Aberdeen. — In a competition for a lady's life-rent annuity, some of her second husband's creditors having formal assignations thereto, duly intimated, and another producing a bond granted to him by the said second husband, and the heir of the first husband, containing in corroboration an assignation to the same annuity; the Lords preferred this creditor, and found no need of any other intimation but the heir's subscribing the writ, which sufficiently supplied it. Forb. 28. March 1707, competition creditors of Ballenden.

AN assignee to a woman's liferent, getting decree of removing against the tenants, was found preferable to prior assignees, whose assignments were not intimate. *Intimation by process.*

Nicolson (*Assignment*) 21. Jan. 1622.

Elphinston.—In an action for registration of a bond, the defender alledging, That he had paid the cedent before intimation of the assignment; the Lords found, That the summons of registration being execute against the defender, before the payment made to the cedent, it was a lawful intimation. Had. 22. March 1622, White.

—The Lords found a disposition to a lady's jointure sufficiently intimated, so as to exclude an arrester, that either the tenants were cited at the assignee's instance, to make payment to him of their rents, or that the disposition was produced in the baron-court, and intimated to the tenants, altho' the decret given thereupon against them was thereafter turned into a libel. Home, Dec. 1681, Ogilvie.

Intimation by payment of annualrent to the assignee.

PAYMENT of annualrent to the assignee is equivalent to an intimation. Nicolson (*Annualrent*) 16. Nov. 1626, Livingston.

AN onerous assignee to a debt, which was assigned to his cedent for the behoof of the debtor, cannot recover it. *Later decisions.* Falc. vol. I. p. 100. McIntosh, 14. June 1745.

CREDITORS found preferable in moveables left to a relict, are bound to assign their debts, in order that the relict may affect the real estate, but not to compete with them. Falc. vol. I. p. 186. Balmerino, Dec. 18. 1746.

WHEN the debtor concurs in the assignment, intimation is unnecessary. Remark. Dec. p. 260. Turb June 12. 1751. Falc. vol. II. p. 253. He observes it. 25. June 1751.

ASSIGNATION to mails and duties. See *Composition*.

GRATUITOUS discharge made by the cedent after assignment. See *Bankrupt*.

BONA fide payment made to the cedent, where the assignment is intimate, but not personally to the debtor making payment. See *Bona fide payment*.

Assignment.

ASSYTHMENT.

A PRISONER liable for a sum, in name of assythment, has not the privilege of a *cessio bonorum*. Remark. Dec. p. 266. Malloch. 19. Nov. 1751.

B A N K.

IN a case between the Royal and Old Banks of Scotland, it was found, That neither horning, inhibition, nor arrestment, were competent against the Old Bank, upon their notes or tickets, the diligence being done *in emulationem*. 11. July 1728, Royal Bank of Scotland.

B A N K R U P T.

And first, Reduction of Alienations made by Bankrupts, where the Reducer has done no Diligence.

FOUND, That as a creditor might take payment from his debtor, altho' *in meditatione fuge*, and in the present case upon the same day that he fled, so he might also take assignation to debts for his payment, seeing no other of the creditors had done any sort of diligence against the common debtor before his assignation. Dur. ult. Jan. and 1. Feb. 1627, Scougall.—A disposition granted by a notour bankrupt was not reduced upon the act 1621, at the instance of the other creditors who had done no diligence, the disposition being in satisfaction of a bargain of victual sold and delivered to the bankrupt about a month before the disposition. Stair, 20. July 1671, Birkenbog.—A confident person being sued upon the act 1621, by an onerous creditor, whose debt was prior to the disposition granted to the confident person, it was not found a good defence, That the disposition was applied to satisfy a debt of the bankrupt's, the debt being granted *in lecto*, which was known to the defender, and therefore presumed gratuitous. Stair, 3. Feb. 1672, Home.—A disposition to a brother, for

Onerous alienations not reducible upon this head of the act.

satisfying debts resting to himself, and those for which he stood bound as cautioner, and to pay off such other creditors as he should think fit, was only found valid as to his own debts and cautionries, and to fall under the act 1621 as to the others. Gosf. 6. Jan. 1669, New-man.—The Lords, in a case which fell out before the act of parliament, 1696, touching bankrupts, refused to reduce heritable rights granted by a party to some of his creditors, tho' it was alledged, by the other creditors pursuers, that he was bankrupt at granting the deeds. Fount. 25. Nov. 1696, Creditors of Campbell.—An heritable bond of corroboration being granted by an eldest son in fee of the estate, to some of his own and his father's creditors, and another creditor contending, That tho' the granter was not notour bankrupt, by the marks given in the act of parliament 1696, yet that, at granting, he was materially bankrupt, in so far as he was insolvent and *operatus* above the value of his estate; the Lords found, That the receiver of the corroborative security, not being a confident person to the granter, the right he received from him could not be reduced on the head of mere insolvency, where the granter was not under diligence, nor retired, nor had the other marks contained in the standard made for bankrupts, by the said act of parliament. Fount. 13. July 1698, Moncrief.

EVEN before the act of parliament 1696, it was frequently found, That a notour bankrupt was tied up from any considerable or total alienation to any of his creditors, in prejudice of the rest, tho' none of them had done diligence; which was not so much from the statute 1621, as from the nature of the thing, that bankrupts should not have it in their power to gratify one creditor at the expence of another, which is a plain act of injustice. Dirl. 23. July, Stair, Gosf. 18. Dec. 1673, creditors of Tarperfy.—The like; Stair, 29. June 1678, Cranston, Stair, 14. Nov. 1679, Pollock.—Thus a party having granted to two of his creditors, when there was no diligence raised against him by any person, a disposition *omnium bonorum*, for satisfying their debts; the Lords, upon application of a third creditor, found, That by such a general disposition he became bankrupt; and therefore, that all the

the three should come in *pari passu*. Falc. 10. Feb. Home, March 1685, Brown.—And an uncle having taken a disposition from his nephew, of his whole estate, not for a price told down, but in satisfaction of anterior debts, whereby the nephew became utterly insolvent, and incapable to perform his other engagements, this was found to be fraudulent, and the disposition was reduced *ad hunc effectum*, to bring the creditors in proportionally to their sums. Stair, 18. Jan. 1678, Kinloch.—A debtor, against whom no diligence was done, having granted a disposition, *omnium bonorum*, to one of his creditors, in security and payment, and another creditor having arrested in the disponent's hands, and in a forthcoming insisted, that the disposition was null, and that he was preferable by virtue of his diligence; the Lords reduced *ad hunc effectum*, to bring him in *pari passu*, and repelled the *jus retentionis* pled for the disponent; for, if the disposition was unlawful, the disponent could have no just title to retain possession. 25. Feb. 1737, Cramond.

A PERSON insolvent, but against whom no diligence was done, having made a disposition in favor of his near relations, for security and payment of debts owing to them, neglecting his other numerous creditors, the disposition was found fraudulent, and therefore was reduced. Fount. 28. Jan. 1696, Scrimzour.—The contrary had been found; Dur. 3. Feb. 1632, Jack. Dur. 17. Jan. 1632, Skeen.

WILLIAM INNES, factor to the Dukes of Buccleugh, having fallen in considerable arrears, granted a disposition to her Grace, of particular subjects for her security and payment of the balance. It was objected against this disposition, by the granter's other creditors, That it was virtually a disposition *omnium bonorum*, tho' it contained no general clause of all goods and gear, because the debtor's whole effects were therein comprehended. Answered, There is a great difference between dispositions bearing to be *omnia bonorum*, and a disposition to any particular subject, supposing the granter should

Or alienations in favor of conjunct persons.

What understood by a disposition *omnium bonorum*?

not be found to have any other estate. The grantor of an universal disposition makes and declares himself bankrupt, by the very tenor of the deed, which hath the same effect in law, *quoad* the acceptor, as if the grantor had been judicially declared bankrupt before, or notourly made so by a course of diligence; whereas every true creditor is in *bona fide* to accept from his debtor, against whom no diligence is done, any of his effects, either in security or payment. This objection was repelled. Dec. 1728, Ducheſs of Buccleugh.—A dis-

position by a tenant, of the corn crop upon his possession, and all and haill his horse, milt and sheep, and other goods and gear, of whatever kind, pertaining and belonging to him, was found a disposition *omnium bonorum*, it not being alledged, that he had any debts due to him by bond or bill, or any heritable subjects. 25th Feb. 1737, Cramond.

A PARTY having granted a gratuitous disposition of lands, it was reduced at the instance of a creditor of the disponent's, altho' at granting he was a man of entire credit, no diligence having been raised against him, only he broke a little after granting the disposition. Dur.

16. Feb. 1628, Kilgour.—A gratuitous disposition, reserving the granter's liferent, and a faculty to sell a part of the land for payment of debt, was reduced at the instance of a prior creditor, who had done no diligence, to this effect only, That the pursuer might affect the land with legal diligence for his debt, as if the disposition had not been granted; for seeing, by this disposition, there remained no fund sufficient *ad paratam executionem*, the Lords thought there was no reason to put the pursuer to insist upon the foresaid faculty, and to restrict himself thereby to a part of the lands, but that he ought to have preference upon the whole land, according to his diligence. Stair, 6. Feb. 1663, Lourie.—A reversion being granted, in a disposition to the disponent's heirs alienarly, and he being *obtratus*; the Lords thought, That if the price was not adequate, which was to be tried, a reduction of the disposition, at the instance of creditors, ought to be sustained, and access allowed to them to comprife the reversion.

reversion. Dirl. Gosf. 5. Jan. 1677, Glencairn.—A disposition *omnium bonorum*, by a wife to her husband, bearing for love and favor, and for onerous causes, was not sustained to compete with an anterior obligation, for an annuity granted by the disposer to her husband. Forb. 24. July 1706, Wemyss.

GRATUITOUS alienations are not reducible upon the act 1621, if the debtor became

not thereby insolvent. Home, 11.

Dec. 1717, Creditors of Meldrum.

Our. 5. March 1629, Borthwick.

Our. 6. March 1632, Garthland,—

But a gratuitous assignation to a con-
junct person, a few days before the

grantor's death, was reduced at the

instance of a creditor of the deceased's, confirming the

same subject, tho' it was offered to be proved, That

the common debtor was solvent at the time of grant-

ing; it being more just, to oblige the conjunct person to

be at the trouble and expence of seeking out the de-

ceased's hidden funds, than the onerous creditor, Fount.

Dec. 1710, Daes.—In support of a gratuitous alie-

nation made by a debtor, who, at the time of reduction,

was a bankrupt, it was found relevant, That when he

made the alienation, he had a sufficient visible estate to

pay the pursuer, and all his other creditors. Stair,

Dirl. 30. June 1675, Clark.—A gratuitous alienation

was sustained, and found not reducible by onerous cre-

ditors, if the disposer had then a visible estate suffici-

ent for all his debts, whether by investments, move-

ables, or bonds, tho' *ex eventu* he proved insolvent.

Stair, 10. Nov. 1680, M'Kell. Home, Dec. 1681,

M'Kell.—The Lords found, That if a debtor had a vi-

sible unincumbered estate at the time of his disposing to

his sister, and her husband, more than would have paid

all his debts, the disposition could not be annulled on

the act 1621; especially considering, That, in the pre-

sent case, the pursuer of the reduction was in *mora*, not

having adjudged the lands for 17 years after the dispo-

sition. Forb. 11. Fount. 15. Jan. 1712, M'Kenzie.

The like, Forb. 17. June 1712, Ker.

IN the computation of a separate estate, the Lords

refused

refused to reckon any heritage which was tailzied, with

What understood a sufficient separate estate, to bar reduction?

clauses irritant, and which the common debtor could not dispose of for payment of his debts. Forb. 29. July 1712, Ker.—But, where a person had exhausted his land-estate by gratuitous infeftments, it was not sustained

to bar reduction, that the grantor had a sufficient personal estate at the time of granting, it being hard to oblige the creditors to expiscate and hunt after a latent moveable estate. Harc. (*Bonds*) 20. July 1688, Children of Mouswall.—In a like case, the Lords first reduced the disposition, unless it was proved, That the father disponer left a visible estate, not in personal bonds or money, for these may be daily altered, but in heritable rights, sufficient to pay the pursuer's debt; but they altered this afterwards, and only required a visible estate *quomodocunque*. Foul. 10. Nov. 1680, Calendar.

IN a reduction upon the act 1621, of provisions granted by a father to his children, a question occurred, Whether the father had a sufficient estate at the date of these provisions? The fact turned out, That his estate was burdened with two liferents, which subsisted above twenty-four years thereafter, whereby the funds came, *ex eventu*, to fall short, and not sufficient to pay all the debts; the Lords would not sustain the burden of the liferents, *secundum eventum*, but at what they were worth when the bonds were granted to the children; and they estimated the liferent of the elder to five, and of the younger to seven years purchase; by which account the father had free above £. 30,000 Scots, when he granted the bonds of provision to his children; and therefore they sustained the said provisions. Stair, 11. Dec. 1679, Creditors of Mouswall.—But thereafter, the Lords altered this interdictor, and found, That liferents, in this case, should be reckoned according to the full time they had run, and that if they were still subsisting, some further consideration ought to be given for the time they might run thereafter. Harc. (*Decrets*) March 1684, *inter eosdem*.—And, lastly, in the same case, the liferents being run out, when

the cause was still in dependence, they were computed according to the full time they had subsisted. *Harc. (Bonds) 28. July 1688, inter eosdem.*

A second assignation being first intimated, the Lords nevertheless found it reducible upon the act 1621; the first being an anterior debt, by the warrantice of the assignation, and this, tho' both the first and second were lucrative, and gratuitous assignations. *Fount. 11. Dec. 1695, Blair. Stair, 15. July 1675, Alexander. Fount. 7. Feb. 1699, Hay*—A cedent, after granting assignation, cannot gratuitously discharge the debt, tho' before intimation. *Stair, 3. Feb. 1671, Blair*.—A first disposition, with last infestment for onerous causes, preferred to a second gratuitous disposition, of the same subject, first infest. *Stair, 23. July 1662, Fraser. The like, Forb. 24. Jan. 1706, Wilson.*

Second gratuitous alienation of the same subject, reducible at the instance of the first, tho' the granter be not insolvent.

A BOND, granted after marriage, for a suitable life-rent to a wife by her husband, insolvent at the time, was sustained, when quarrelled by creditors after the husband's death, and she was allowed to come in proportionally with them, altho' there was neither contract of marriage nor tocher given, and altho' the creditors bonds were anterior to the relict's, seeing hers was *de jure natura due*. *Dur. 19. June 1635, Walker*.—A husband, during the marriage, having given a life-rent provision of his whole estate, in lieu of a contract of marriage, whereby his prior personal creditors were like to be defrauded, at least postponed, till after the death of the life-rentrix, tho' the subject then would be sufficient to pay all the debts; the Lords found the infestment, given in consequence of the said provision, reducible, in so far as exorbitant, and valid only, in so far as competent for such persons, according to the condition of the husband's estate and the wife's tocher. *Goss. Stair, 19. Jan. 1676, Stansfield*.—A husband, during the marriage, having infest his wife in an annuity of L. 72 Scots a year, upon a narrative, that she was not otherwise provided; in a reduction after the husband's

Provision in favor of a wife, how far onerous?

husband's decease, at the instance of his prior creditors upon the first branch of the act 1621, it was pled for them, 1700, That tho' a husband is naturally bound to provide his wife in a jointure, this obligation ceases by his insolvency, equally with the obligation to aliment her during the marriage. 2d0, At any rate, a liferent provision, granted in the circumstances of insolvency, ought never to exceed a *rationalis tertia*, which the present did. To the first it was answered, That tho' the obligation upon a husband to provide his wife in a jointure, could not be made the foundation of a process at common law, it was still a *debitum naturale* which he was bound to perform, and there was no law to bar him from applying his effects to that purpose, as well as towards the fulfilling of his engagements to any other of his creditors, since the doing justice to one creditor, in preference to another, is in the power even of a bankrupt who is not interpellated by diligence; and that the law, in this case, made no distinction between creditors, whether more or less onerous; and therefore, that the liferent infestment must stand, as not being a gratuitous deed, unless the creditors could say, that it was done with a view to prefer the wife to the other creditors, so as to found a reduction upon the head of fraud, of which there was no presumption in the present case. To the second it was answered, That if the liferent was immoderate, it would be reducible, *quoad excessum*, and restricted to a *rationalis tertia*; but where the estate was so small, that the terce was not sufficient for a moderate aliment, there was no reason for making it a rule. The Lords said, That, the provision in question, granted to the wife after marriage, there having been no preceding contract, was rational and onerous, and therefore, that it did not fall under the act 1621.

11. Jan. 1738, Robertson.—In a marriage-contract, the husband, by a personal obligation, provided his wife to a jointure of L. 180 Scots yearly, and also to the sum of L. 1000 Scots, failing children of the marriage. During the marriage he infest his wife in tenement of L. 10 Sterling of yearly rent, bearing, "To be over and above any former provision made in favors of his spouse." The husband having died insolvent, his creditors raised a reduction of the infestment,

ment, upon the first head of the act 1621, as being gratuitous; the relict acknowledged she could not hold both the personal provision and infestment; but observed, that the case would be hard; if the creditors, who had put her out of her personal provision, by preventing her diligence, should be allowed to turn these provisions against her, in order also to cut her out of her liferent infestment; and therefore answered, that as a reasonable provision granted *stante matrimonio* to a wife, not otherwise provided, would be effectual, tho' the husband was insolvent at the time; so the present infestment, tho' designed as a gratuity, coming out to be no other than a reasonable provision, was not reducible; gratuitous it could not be said to be, with regard to the relict, who resigns every other claim against the husband and his creditors. The Lords found the wife's infestment was not reducible upon the act 1621, 17. Feb. 1738, Kenzie.

A WIFE, having assigned the price of lands to her husband, by contract of marriage, in name of tocher, which he recompensed with suitable provisions to her and the children of the marriage; the Lords found the assignment not reducible upon the act 1621, at the instance of an anterior creditor. Forb. MSS. 22. Jan. 1714, Lockhart.

IN a competition between two apprisers, one of them upon a bond of provision, it was found relevant to prefer the other apprising *In favor of* by an onerous creditor, that the *children.*

Delivery of the bond of provision was posterior to the onerous debt. Stair, 22. July 1668, Johnston.—A son *in familia*, getting a disposition of lands for love and favor, and having thereafter made voluntary payment to several of his father's creditors; the Lords found, that it might be reduced at the instance of his step-mother, upon her contract of marriage, tho' no diligence was done by her to put him in *mala fide*, to pay debts which were contracted after her liferent provision, seeing, being a son *in familia*, he could not miss to be in the knowledge of her right. 24. June 1670, Home.—In a reduction, upon the act 1621, at the instance of prior creditors, against bonds of provision granted to children; this defence was

was found relevant, That the father had sufficiency of estate at the time of granting these provisions, to satisfy both them and his former debts. Gosh. 5. Stair. Dir. 6. Jan. 1677, Children of Mouswall. Stair, 11. Dec. 1679, *inter eosdem*.—The Lords sustained bond of provision, tho' the father was under burden, if solvent. Fount. 7. Feb. 1679, Hamilton.—Innerguson having given a bond of provision to his children, when on infestment followed after his death; the Lords reduced the bond at the instance of anterior creditors, tho' the father was not bankrupt at the date of the bond, but it had remained latent during the father's life. Marcus (*Bonds*). Feb. 1688, Anstruther.—In a competition between a deceased's creditors and his daughter, for a sum in a bond, which he had taken payable to him and her, the longest lived and their heirs and assignees; the Lords found the daughter simply preferable to the creditors, whose debts were contracted posterior to the date of the bond, and preferred her even to the anterior creditors unless they would alledge, that the father was insolvent at the time of his decease, when her fee began: for the thought, that parents might give provisions to the children, unless they were either impeded by creditors diligence, or actual insolvency. Fount. 12. Jan. 1691, creditors of Kinfauns.—A father filling up his son's name in a blank bond, and delivering the same to him, his posterior insolvency is no cause of reduction. Fount. 1. Feb. 1697, Campbell.—It was found, That a party having disposed his estate to his eldest son, with the burden of divers provisions to his other children, the father's creditors might be heard against these provisions, either as latent or undelivered; or that fathers cannot burden their estates with sums of money payable to their children, till their lawful creditors be satisfied at least, that they must have a considerable visible estate, sufficient to pay, at the time of settling these provisions. And it was further found, That the father's condition might be enquired into, whether insolvent at that time or not. Fount. 9. Feb. 1700, Edmiston.—A wife was provided to the liferent of her husband's whole means, but, in the case of children, she restricted herself to the half, and renounced the remainder.

vors of the children. This was found not sufficient to prefer the children to creditors, whose debts were before the contract of marriage, seeing the creditors had no other fund of payment during the relict's life. *air*, 23. Dec. 1679, *Erskine*.—A wife, who brought a tocher of 2000 merks, being provided in a liferent of 10 merks a-year, but with this quality, That, in case of children, she should renounce 100 merks a-year in their favor; it was found, That the jointure here was not suitable to the circumstances of the parties, and therefore, that the renunciation, in favor of the children, was not to be presumed a fraudulent contrivance, in order to cover this provision to the children from anterior creditors; and therefore, the children were preferred in a competition. *Fount*, 1. July 1703, *Reid*. A BANKRUPT, before his insolvency was known, having contracted a jointure to his son's

house; the Lords refused to restrict the jointure, and found her provision onerous and suitable, her tocher having been 8000 merks, and the jointure 2000 merks, restricted to 1800

Provisions made in contracts matrimonial, how far onerous?

merks, in case of children of the marriage. *Dalrymple*, 17. Feb. 1715, *Creditors of Menzies*.—A person insolvent became bound, in his nephew's contract of marriage, amongst other provisions, to pay the wife a yearly annuity of 2000 merks, to commence after the husband's decease, in security of which he insisted her incertain lands; the granter's creditors raised a reduction of this alienation, upon the act 1621, alleging it to be *ultra vires* for the granter to make voluntary alienations of his effects, in prejudice of his prior lawful creditors; the Lords refused to sustain the reduction, the said liferent-provision being onerous as well as the wife, in so far as, upon the faith thereof, she had entered into the marriage-contract. 18. Nov. 1729, *Creditors of Sir David Thoirs*.—But a father, while in prison, and commonly reputed bankrupt, having made an assignation to his son-in-law, which, being in place of a tocher, was pled to be directly onerous, the daughter at her marriage not being otherwise provided; yet the Lords found the same reducible; for the marriage having been contracted, while the father was in these circumstances,

circumstances, it was nothing a-kin to the case, when the father was in entire credit; so that the son-in-law, in this case, accepting of a provision with the spouse, in a contract of marriage, or otherwise, must be understood to run the hazard of all the father's debts. Stair, 23. Nov. 1680, Wood.—The Lords found an assignation by a father to his son, in his contract of marriage, reducible at the instance of the cedent's creditors, upon the act 1624, as a gratuitous deed *inter conjunctos*, unless the son could instruct, that his father had then a sufficient separate unincumbered estate for paying all his debts, seeing the assignation, tho' in a contract of marriage, was nowise conceived in favor of the wife, or children of the marriage, but simply to the conjunct person, his heirs and assignees. Forb. 3. July 1712, Hepburn.—A man, in his first contract, provided the children of the marriage in 25,000 merks; and in his second contract, he provided the children in 36,000 merks, in which period he had sufficiency to answer the whole provisions; but at his decease, his funds falling short, the Lords reduced the provisions in the second contract in so far as prejudicial to the provisions made to the children of the first marriage, there being still a competency remaining to the children of the second marriage. Forb. 22. June, Fount. 26. June 1711, Aikenheads.—But thereafter, in a ranking of creditors, the Lords allowed the children of the first and second marriage to be the common debtor, who were provided to sums in their respective mother's contracts, to come in *pari passu* proportionally, effecting to their respective sums. Bruce, 6. July 1715, Auchinvole.—A father, at his son's marriage, having given L. 40,000 Scots, tho' the father was at that time solvent, the Lords, upon his eventual bankruptcy, sustained action against the son, at a creditor's instance, to make so much of the L. 40,000 Scots forthcoming, as would satisfy his debt: for it was thought that debtors ought not to have it in their power to prejudice their creditors by such extravagant gratuitous whereby, tho' perhaps they were not rendered directly insolvent, the creditors were greatly harmed, by losing most part of their security. Stair, 8. Feb. 1671, Wood.—A man who, in a second contract, had provided the children of the marriage to the fee of 6000 merks thereafter

hereafter disposed to his eldest son by his first wife, in that son's contract of marriage, two tenements, valued about 3000 merks, which proved to be most of his substance, burdening the same with L. 1000 Scots to the children of the second marriage; the Lords found the deed gratuitous *quoad* the eldest son and his children, and reducible *in totum* upon the act 1621. 12. June 1730, Cock.

IT was found, That a debtor granting disposition, in favor of a conjunct person, of some heritance and moveables he had fallen heir to, and not being able otherwise to pay his debts, the same shall within the act against *dyvors*. Dur. *This reduction reaches adque- renda as well as acquisita.*

7. Jan. 1632, Skeen.

IN a reduction upon the act 1621, of a gratuitous bond, as being after contracting of lawful debt, the question occurred as to bargains, merchants compts, and furnishing, whereof the probation and decrees of constitution were after the

Who reckon- ed prior creditors?

gratuitous bond; the Lords found debts constitute by witnesses to be effectual from the time of contracting, and take away any posterior deed of the debtor, done without a cause onerous, and not from the time of probation or sentence only. Stair, 21. Jan. 1669, Creditors of Pollock.—In a reduction upon this act, the debt sued upon was a bond, bearing merchant-ware, dated after the gratuitous right; the Lords found, That the quantities, and times of furnishing, might be proved by witnesses; and albeit, there had been a discharge of the ware upon granting the bond, yet that so much thereof as was furnished before the gratuitous right, could affect the same. Stair, 27. July 1669, Street.—In a gratuitous disposition, reduced at the instance of a prior onerous creditor, by an implied warrandice, tho' the decree, establishing the debt, upon incurring the warrandice, was not till after the disposition. Stair, 28. Nov. 1679, Cathcart.—In a declarator of bankrupt, the Lords refused to sustain the presumption, that the acceptance of the bill was of the same day's date with the bill itself, unless it was otherwise proven. And it was found, That the pursuer, who had only produced an

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accepted

accepted bill as his title, was not creditor to the bankrupt till acceptance; and which acceptance, being posterior to a disposition, the bankrupt had granted to other creditors, they found the pursuer had no interest to quarrel the same, unless he could astruct and fortify his bill by some grounds of debt owing to him by the bankrupt prior to the same. Fount. 25. July 1702, Man.

A REDUCTION of a gratuitous right, upon the act 1621, is sustained against singular successors in the right, where the right

*This reducti-
on, if good a-
gainst singular
successors?*

bears to be gratuitous; in which case, singular successors, tho' paying a price, cannot pretend to acquire *bona fide*. Stair, Gosf. 6, Feb. 1672, Hay. See

Dur. 11. July 1637, Robertson.—A disposition, by a man to his brother-in-law, found null by the act of parliament, unless the onerous cause was instructed: And in a reduction against an onerous purchaser from the brother-in-law, the Lords obliged the onerous purchaser to instruct the onerous cause of the disposition between the conjunct persons; and they found, that he was not secured by the clause in the act of parliament, in favor of purchasers *bona fide* from intrusted persons, which did not extend to a purchaser knowing his author to be a conjunct person, as did appear, in this case, from the very tenor of the disposition. Stair, Fount. 24. Jan. 1689, Crawford.—Tho' participation of fraud, mentioned in the act 1621, be not confined solely to him, who is upon the contrivance and design of defrauding the creditors, but is extended to singular successors purchasing from conjunct and confident persons; yet it is not sufficient to reduce the purchaser's right, that he knew his author's relation to the bankrupt, unless he was also in the knowledge of the bankruptcy; because there is no law to bar a man in good circumstances, from disposing, even gratuitously, to his near relations: And because knowledge is *animi*, it must be presumed, from circumstances, the most pregnant of which is, that he was generally held and reputed bankrupt. Fount. 28. Nov. 1693, Spence.—A disposition, to a conjunct person, bearing for security of a sum owing to him by the granter, who was solvent at the time, having never been quarrelled for 58 years, the Lords found, That a singular successor to the receiver

of the disposition, was not obliged to prove the onerous cause thereof, otherwise than by the narrative, in a competition with anterior creditors of the granter, when his estate had proved insufficient to pay his debts. Forb. 2. Feb. 1711, Guthry.—William Sangster, having disposed a tenement in Aberdeen, narrating an onerous cause, to Charles Sangster, who happened to be his brother, Charles disposed the same over again to his daughter and her husband in their contract of marriage, but without making mention, that the subject was derived to him from his brother William. A great number of years thereafter, action of reduction, upon the act 1621, was intended of these dispositions, by a prior creditor of William Sangster's, libelling, that the disposition, from William to Charles, being between conjunct and confident persons, must be presumed gratuitous; and that therefore, Charles's daughter and her husband, who knew of the said conjunction, tho' in the eye of law, onerous purchasers, can be in no better case than their author. The defence was, That it was very likely the daughter and her husband knew of the relation between William and Charles Sangsters; but, at the same time, there was no sort of evidence of their knowledge, that Charles's right was derived from his brother William, without which they were in *optima fide* to purchase; and, unless this knowledge be proved, they can never be brought in as *particeps fraudis*. The Lords, in respect there was no evidence that the defender was in the knowledge, that Charles Sangster's right flowed from William Sangster his brother, assilzied from the reduction. 9. Jan. 1730, Allan.—A disposition by a man, to one designed in the writ to be his brother-in-law, and bearing to be for a certain sum of money, being challenged by the disponent's creditors, the disposition being *inter conjunctos*, was found not to instruct its onerous cause; and the receiver's creditors having adjudged the disposition, they were found to be in no better condition than the receiver himself, seeing the conjunction was expressed in the disposition. Forb. 15. June 1710, Lelly.—As a second gratuitous disposition, of the same subject, clad with the first instrument, is reducible at the instance of the first, tho' the granter have funds *aliunde* sufficient to pay his debts; so that

duction was also found to have place against the second disponee's creditors, who had adjudged the estate from him, in respect the second disposition was from a father to his son, and bore to be gratuitous. Jan. 1723, Lyon.—One having disposed lands to his third son, in the disponee's contract of marriage, and thereafter disposed the same lands to his second son, with the burden of debts; in a competition between the first disponee, and an onerous purchaser from the second disponee, both craving adjudication to implement of their dispositions; the Lords found the long latency of the first disposition, sufficient to prefer the onerous purchaser, who had purchased *bona fide*; thus far to make up his just and true interest, but not to give him any advantage by the bargain; and therefore, adjudged in his favor, under reversion to the first disponee, upon payment of what was truly wanting to the onerous purchaser. Stair, 16. July 1675, Campbell and Riddoch.—One having disposed a land-estate to his son-in-law, the disposer's creditors, at the distance of above 40 years, brought a process of reduction, upon the act 1621, against a singular successor, who had no right to the lands, upon this medium, That the disposition, being to a conjunct and confident person, must be presumed gratuitous; and the defender, tho' an onerous purchaser, can be in no better situation, seeing the connection between the parties appeared, *ex facie* of the conveyance; the Lords abstracted from the defence of prescription, seeing there were some traces of interruption, and found, That the singular successor, at such a distance of time, was not bound to instruct the common debtor's solvency when he granted the disposition to his son-in-law, not even so much as that he was then burdened and reputed solvent. Fount. 23. Dec. 1692, Spence.

Alienation after Diligence.

THE real creditors of a bankrupt, having taken infection on their former precepts of sale, after the bankruptcy, and even after the personal creditors had charged with horning; the Lords found, That there did not arise any hypothec, or *jus reale*, to the personal creditors.

What sort of deeds reducible upon this head of the statute?

the common debtor's becoming bankrupt, so as to impede real creditors to infest, &c. notwithstanding the charges of horning before completing their rights by infestment, seeing the act 1621, discharges only voluntary rights after diligence inchoated: but here, the debtor had given the heritable bonds before, and nothing hindered the real creditors to infest *quando-cunque*. Fount. 16. Dec. 1696, Creditors of Hunter competing.—An eldest son, who had become bound for some of his father's debts, and upon that account, forced to retire to the Abbey, was charged to enter heir by his father's other creditors, and gave in a renunciation *intra annum deliberandi*, upon which adjudications were laid: Upon this the creditors, to whom the son was personally bound, and who had also adjudged the estate upon special charges, insisted in a reduction of the adjudications led by the other creditors; contending, That the bankrupt ought to have made use of his privilege of deliberating for year and day, which if it had been done, the defenders would not have come in within year and day of the pursuers, and as he was then incapable to grant any voluntary right, a voluntary renunciation was of the same nature. It was answered, If the bankrupt had made use of his privilege, the law would interpret it to be collusive, done with a view to disappoint his father's creditors; the Lords assailed from the reason of reduction. Fount. 25. July. 1697, Creditors of Hunter competing.

A BANKRUPT having granted an assignation to one of his creditors, in prejudice of another who had done more timeous diligence by horning, &c. and the prior creditor having affected the subject assigned, by taking a gift of escheat, was found to have action of repetition against the assignee obtaining payment. Stair, 11. Nov. 1675, Veitch.—A master having procured a disposition from his tenant, for payment of a preceding year's rent that fell not under the hypothec, after the tenant was denounced at the horn by another creditor, and the master having obtained *bona fide* payment, by virtue of the said disposition; the Lords found, That he could not be liable to repete what he had received, more than if he had pointed, altho' the creditor, who first

*Payment, if
challengable?*

had done diligence, would have been preferred in competition. Forb. 9. July 1709, Lady Rickerton. Denunciation with insolvency, not a sufficient foundation to reduce posterior payments made by the common debtor, unless, at the same time, he had been commonly reputed a bankrupt. Dal. Bruce, 7. June 1715, Tweeddale.

NOTWITHSTANDING of diligence, a bankrupt may sell his lands for a price presently told down; because such alienation

Contractions or alienations, where money is instantly advanced, not reducible,

are no partial gratification of one creditor in defraud of another. Stair, Feb. 1681, Neilson.—And he may also grant bond for borrowed money. Stair, 28. June 1665, Montieth.

Reduction not sustained, unless the common debtor became insolvent by the alienation,

A PARTY being *oberatus*, and standing registred at the horn, before he granted a disposition now quarrelled; the Lords found this not sufficient to annul the deed, unless they would conjoin together, that he was then both *oberatus* and bankrupt, one holding not being sufficient for that purpose. Fount. 12. Feb. 1686, Cockburn.—In a reduction, at the instance of a creditor of one who was acknowledged *oberatus* at the time of granting rights correlative to other creditors, in so far as their rights were granted after the debtor was charged with horning by the pursuer, but before denunciation thereon, this following, not for several months after charging; the Lords sustained the pursuer's reduction, he proving the debtor's insolvency at that time, tho' his condition was not then so propalled, as to make him holden and reputed a notour bankrupt, the standard being but lately fixed by act of parliament, determining a notour bankrupt's marks and description. Fount. 19. Nov. 1697, Milne.

THE Lords reduced a disposition because of an inhibition, altho', 1st, The inhibition was not registred. 2^{dly}, It was by virtue of a factory, prior to the inhibition, and so depended on an anterior cause. 3^{dly}, Tho' it was done *autore pratorum*, the lands being roup'd by order of the Lords; but here the party was bankrupt at granting the

Inchoat inhibition, if sufficient to found the reduction?

1st, The inhibition was not registred. 2^{dly}, It was by virtue of a factory, prior to the inhibition, and so depended on an anterior cause. 3^{dly}, Tho' it was done *autore pratorum*, the lands being roup'd by order of the Lords; but here the party was bankrupt at granting the

the disposition. Fount. 13. Jan. 1697, Elphinston.—
 The suspension of a charge in the year 1649, at the in-
 stance of one Lyell, against Sir William Dick, not be-
 ing discussed, by reason of the war and interruption of
 justice, till 1652; and then the charger having proceed-
 ed, without denouncing, to apprise in the year 1653,
 and to raise inhibition, which was executed and regi-
 stred in 1654; Sir William assigned a moveable bond
 to one Mowat, of which assignation Lyell raised reduc-
 tion, as being a gratification after her diligence. It was
 alledged for the defender, that the charge on which de-
 nunciation and registration did not follow, was not suf-
 ficient diligence to hinder the assignation; and the real
 diligences cannot be regarded, seeing they affect not
 moveables. 2da, It is not sufficient that diligence was
 inchoat, seeing the creditor was in *mora* to consummate
 the same. Answered, Where a debtor is bankrupt, any
 diligence is sufficient to hinder him to make a volunta-
 ry preference among his creditors, and there was no
 negligence in the pursuer to prosecute his diligence, by
 reason of the war and cessation of justice. The Lords
 sustained the apprising, as a sufficient prior diligence,
 and found a formal inhibition a due diligence, to hin-
 der gratification out of moveables. Harc. (*Alienation*).
 25. Nov. 1687, Dalrymple.—A creditor having
 executed an inhibition against Sir Walter Seaton, his
 debtor, personally, upon the first of February, pub-
 lished it at the market cross of Linlithgow upon the
 fourth, and registred the same upon the sixth day: the
 debtor, upon the second day of the said month of February
 subscribed a minute of sale of his lands to another cre-
 ditor, which was quarrelled, both as a gratification of
 one creditor, after inhibition at the instance of another,
 contrary to the act 1621, and as an anticipation of the
 inhibitor's diligence when he was *in cursu*. Answered,
 The inhibition was not registred till four days after the
 minute, and diligence is only to be considered after it
 is public by registration; the Lords reduced the minute
 as a gratification to a creditor, and an unlawful anticipa-
 tion of another's diligence. Harc. (*Inhibition*) Fount.
 16. March 1686, Gartshore.—An inhibition raised a-
 gainst two conjunct debtors, and executed against one

of them, was found sufficient, upon the second clause of the act 1621, to reduce a disposition granted by the debtor, in prejudice of the inhibitor, who was in *cursu diligentie*. Fount. 9. Jan. 1696; Brown.

AFTER horning against a common debtor, a disposition made by him, not being for a price paid by way of commerce, but for satisfying a prior debt, was found reducible at the creditors' instance, doing prior diligence. Stair, Fount. 25. Jan. 1681; Bathgate.—A person having sold his lands to two different purchasers, it was found, he having become insolvent by the two minutes of sale, that after horning against him, at the first purchaser's instance, upon his minute, he could not, by gratification, extend the second minute, and grant a settlement to the second purchaser, which was in prejudice of the first purchaser's diligence; and the horning was found to have a general effect, both as to lands and moveables. Stair, 18. July 1677; Murray. The Lords considering, that a charge of horning is a foundation for affecting, either the personal or heritable estate of the debtor, and that a charge of horning satisfies the terms of the act 1621; therefore they sustained a simple charge of horning as sufficient to reduce securities granted afterwards to other creditors, the common debtor's insolvency at the time being proven. Fount. 19. Nov. 1697; Mill.—A charge of horning being given without proceeding further, and then the debtor assigning a subject that was moveable, and after the assignation, the party being denounced, and the horning registrate; tho' none of the marks of a bankrupt, mentioned in the act 1696, was alledged to be found on the debtor; yet the Lords found, that the assignation fell under the compass of the act 1621, against rights in defraud of anterior creditors, unless the assignee would prove, that, at the time of the debtor's granting the assignation, he was holden and reputed solvent. Fount. 24. Feb. 1709. The Bank of Scotland.—The reduction again sustained upon an unregistered horning. Forb. 23. Feb. 1709, Hamilton and M'Kenzie.

TWO

TWO creditors having charged, and the first charger obtaining assignation from the common debtor, intimate before the other creditor's arrestment, he was found preferable, because this was not a preference given to one creditor in prejudice of the more timely diligence of another. Stair, 20. Nov. 1677, Bishop of Glasgow. — One being first charged, at the instance of his wife's friends, to provide her in a liferent, in terms of the contract of marriage, and thereafter by another creditor, his disposing a bond to his wife, in part implement of the contract, was found not reducible upon the second head of the act 1621, seeing it was granted in favor of the creditor who had done most timely diligence. Mount. 14. Jan. 1703, Deans. — The Lords found, that a party having received a voluntary assignation from a debtor, in security of bygone debt, and, by virtue hereof, recovered the sum assigned, might, notwithstanding, after the debtor's decease, legally confirm the said sum, as executor-creditor to him, and, by the confirmation, support the assignation quarrelled upon the act 1621, at the instance of a co-creditor insisting for repetition. Forb. 23. Dec. 1709, Henry. — A debtor's disposition to a creditor, who had charged him after he had been charged by another, being quarrelled as a gratification, was answered, That the disposition being granted in obedience to a charge, it cannot be reputed a voluntary ratification; and replied, That such a disposition, cannot prejudice the more timely diligence of a creditor, who was not in mora; which reply, the Lords found relevant. Harc. (*Alienation*). 11. Nov. 1688, Young.

IN a reduction of a disposition of goods, upon the act 1621, at the instance of a creditor who had done diligence, the Lords referred the pursuer, and refused to follow the assignees, who were also creditors, to come in *pari passu* with him. Home. Feb. 1687, Chapland and Beatman. — In a reduction, upon the act 1621, the Lords found, That the common debtor could not prefer one creditor to another, after diligence done against him by horning, in prejudice of these creditors at

at whose instance the horning or diligence was used, and therefore, reduced such a disposition, as being *in* *molate*, *ad hunc effectum*, to bring in all the creditors *pari passu* together, who had used horning, or other diligence, against the debtor, before the granting of the disposition: But found, That the diligence used by the creditors did not accresce to the other creditors who had done no diligence, so as to give them likewise the benefit of the act of parliament, and to bring them *in pari passu* with these creditors, at whose instance diligence was done, or even with these in whose favor the disposition was granted; and this, because in the present case, the common debtor was not latent nor fugitive, but continued to keep shop, and use merchandise, after granting the disposition. Feb. 11. Jan. Home, March 1682, Cunningham.

THE Lords found, That this act extends, as well to *acquirenda*, as to *acquisita*, and that a debtor cannot dispoise lands or heritable rights, acquired after the creditor's diligence by inhibition or horning, in prejudice of that creditor's debt and diligence, and therefore, they reduced such a disposition. Home.

Nov. 1683, Dempster.

IT was found, That after diligence by horning, the common debtor, who was bankrupt, could not grant any voluntary right in prejudice thereof; and this, because the creditor had continued twenty years without prosecuting his diligence. Stair, 12. Feb. 1675, Veitch.—A party *operatus* having made a general disposition *omnium bonorum*, the Lords reduced the same, in so far as it prejudged such creditors as had charged him with horning before the date of it, tho' he was neither denounced nor registered then, and one of them seemed *in mora*, in forbearing to denounce for a month thereafter. Fount. 21. Jan. 1686, Creditors of Drummond competing.—One having charged his debtor, without denouncing for four months after, and having taken a disposition after the charge, before which disposition, but after the charge, another creditor having charged, and denounced, and

quarrelled

quarrelled the disposition, the Lords reduced the disposition as a voluntary gratification, the first charger having been negligent in delaying so long to denounce. *Harc. (Alienation)* Nov. 1688, Young.—The Lords refused to reduce a disposition to a creditor, upon the act 1621, as made in prejudice of the anterior diligence of horning used by another creditor, who had denounced the common debtor at the market-cross of Edinburgh, and had registered at the horn, in respect that the denunciation was not duly executed at the cross of the head burgh of the shire where the debtor lived: nor any other diligence used after the horning, for several years, to affect either the debtor's heritage or moveables. *Forb. 28, March 1707, Gordon.*—A person, insolvent, after he was charged with horning at the instance of one of his creditors, having granted a voluntary assignation to another, in security of a debt contracted before the charge, the Lords refused, at the instance of the user of the horning, to reduce the assignation, upon the act 1621; because he had been *in motion*, in completing his diligence by denunciation for five months thereafter, or thereby. *Forb. 9. July 1709, Drummond.*

ONE Kirkpatrick, having disposed his lands irredeemably to Lag, who obliged himself, by a back-bond, to denude, upon payment of sums advanced, and to be advanced, by him, and of debts he should acquire, a creditor of the disposer's inhibited him, and comprised the back-bond, Lag, in a suit for maills and duties, craving to be preferred for some debts he had acquired, it was alledged for the other, that the acquisition was a gratification, being posterior to his inhibition. Alledged for Lag, that he being impowered by the back-bond to acquire debt, was not concerned with the inhibition, it not being executed against him, or intimated to him before the acquisition. The Lords sustained the inhibition relevant to hinder gratification made by Lag, after the inhibition was executed against Kirkpatrick. *Harc. (Alienation)* 28. June 1688, Gardner.—In a reduction of a disposition of lands, upon the act 1621, as granted by a bankrupt after diligence, the

*Reduction
of preferences
granted by
means of inter-
posed persons.*

the defence was, that the purchaser had paid the full price to creditors, as he was taken bound to do in the disposition: the defence was sustained, the payments having been made *bona fide* before intending this reduction, reserving to the pursuer action of repetition, as accords, against the co-creditors, who had received payment. Home, Feb. 1682, Neillson.—In a similar case, the disponent having paid debts after intending a reduction of his right, the Lords refused to sustain these payments; but they found the defender, even after reduction was intended, might pay any debt he had undertaken to pay before. Harc. (*Alienation*) 8. Dec. 1682, Grant.

Decisions upon act 5th, parliament 1696 for declaring notour bankrupts.

Has no retrospective.

THIS act has no retrospective. Fount. 16. Dec. 1696, Creditors of Hunter.

IN a competition between two creditors of a bankrupt, the Lords inclined to think that the bankrupt's flying within 60 days, did not annul a voluntary right granted by him within the said space of his breaking, unless there was horning and caption against him before the said voluntary deed. Fount. 15. Feb. 1698. Gray.—The pursuers having proven, That within the 60 days after the disposition, a messenger came with a caption to the debtor's house, who seeing the messenger, did retire and hide himself, so that the messenger, having searched, could not find him; the Lords found, not only that the short absconding, within 60 days after the disposition, did fall under the act of parliament, but also, that a single horning and caption was here sufficient; so that there was no need of a concurrence of diligence against him. Fount. Dalr. 8. Feb. 1705. Creditors of Clelland competing.—Horning and caption upon general letters found sufficient to infer notour bankruptcy, joined with the other circumstances in the act. Dalr. 24. July 1705. Man.—In a process, upon the act 1696, the question occurred

Circumstances that infer notour bankruptcy.

occurred, Whether a horning or caption, labouring under a legal objection, is, notwithstanding, sufficient to render the debtor notour bankrupt? The objection was, That the horning was execute at the debtor's dwelling-house, tho' he had removed out of the kingdom about a fortnight before; whereas it ought to have been at the market-cross of Edinburgh, pier and shore of Leith. Answered, It is sufficient there be a horning and caption; neither the meaning nor the words of the law require, that the diligence be above all exception; and a horning or caption, tho' challengeable by one other ground of law, is sufficient to make the bankruptcy notour, equally as if no exception lay against it. And the construction put upon the act by the other party would open a door to elude the act altogether; a bankrupt would have no more ado, but, upon making over his effects to his favorite creditor, to step over to the other side of the border, and rest secure that his fraudulent deed must stand unexceptionable, because a horning, executed on 60 days, must come too late to bring the deed within the retrospect of the statute. Replied, *Esso* the horning and caption in this case, could be sustained to infer one of the qualifications of bankruptcy; yet the other is wanting, *viz.* flying or absconding for his personal security; now the debtor's retiring out of the kingdom, possibly about his necessary affairs, before any diligence done against him, can never come up to the qualification of "flying and absconding for personal security," which must presuppose diligence already raised, to shun the effect of which, the debtor finds it convenient to keep out of the way. Replied, The act does not presuppose diligence done; a bankrupt who retires to avoid the effect of diligence ready to be raised, and which is morally certain will be raised out against him, is as properly said to fly, or abscond, for his personal security, as if diligence were already raised. The Lords found the horning and caption produced, relevant to infer one of the qualifications of the act 1696, notwithstanding the objection made against it. 24. Feb. 1737, Kilkerran.

IN a question about the interpretation of the 5th act of parliament 1696, and for fixing a period when a party

is to be reputed insolvent, in order to quarrel his voluntary infestments, viz. whether at the time of the granting, or, as his estate is burdened with increasing annualrents, penalties, and accumulations, at the time when he is declared, by the Lords decree, to be bankrupt? the Lords found, That the computation must be as the state of his debt and fortune was at the time of his retiring, incarceration, &c. and if his effects and estate were better than his debt at that period, the infestments he had given, within the sixty days, would not be reduced and annulled, *tho' ex post facto*, his estate came to be overburdened with diligences; and found, That in the computation, no more was to be reckoned but the principal sums and annualrents then owing, with such penalties as were then incurred; but that neither annualrents falling due there after, nor penalties incurred by hornings posterior, nor accumulations arising on diligences led after it, were to enter into the computation, *quoad hunc effectum*, to annul the heritable securities he gave at the time of his breaking, so as to make him insolvent at that period. Fount. 5. Forb. 4. Jan. 1712, Real and personal creditors of Munimusk competing.

Flying or absconding without insolvency, will not infer notour bankruptcy.

AN inland bill, accepted payable to the drawer, indorsed to a third party for value received, was found reducible by the Lords in 1696, against bankrupts, because the indorsation was not for present value paid in by the indorsee, but as security or payment of a debt formerly due by the indorser. Dal. Forb. 16. Jan. 1711.

Campbell.—The like; Fount. 2. Feb. 1700, Durward.—A notour bankrupt having assigned a bond to a trading company for ready money, and having applied for part of the price for payment of a private debt, due to him to one of the company; and it being contended that this was truly a voluntary assignation, for satisfaction of a creditor: It was answered, The assignation was to the company for ready money, and not reducible, and payment thereafter out of the price made to one of the company, was the same as made to any other party.

party; and therefore effectual, unless it could be said, that actual payment is reducible upon this act: This case was found not to fall under the act 1696. 25. Jan. 1733, Buchanan.

A DEBTOR, within sixty days of his bankruptcy, delivered to one of his creditors, lint, dales, &c. in payment and satisfaction *pro tanto*. Against a reduction upon the act 1696, it was pled, That the act reaches not moveables, the commerce of which ought to be free; the Lords found the reduction relevant to oblige the defender to restore the goods, or the value. 19. July 1728, Smith.—The like; Dal. 27. Jan. 1715, Forbes of Ballogie.

Delivery of moveables, in satisfaction of debt.

A VOLUNTARY disposition for a price paid, and not for anterior debts, falls not under the acts 1621 and 1696. Bruce, 1. Jan. 1717, Burgh.

A purchase for ready money not reducible.

THE narrative of an assignation by a bankrupt, bearing money instantly advanced, it was put to the assignee, Whether it was not in security of a prior debt? He declared, That when he lent his money, it was covenanted that he should have the assignation as part of his security; but when the money was lent, and the bond written out, the assignation was not ready, but that it was delivered to him about a week thereafter. The Lords found this assignation fell under the sanction of the act of parliament. 4. Feb. 1729, Eccles.

What understood a purchase for ready money?

AN apparent heir having granted infestments of annualrent, did, thereafter, grant a procuratory to serve himself heir, that his infestment might accresce to the annualrent-rights. In a competition between these annualrenters and posterior adjudgers, it was objected against the procuratory, That it was granted while the common debtor was a notout bankrupt, and therefore null, by the act 1696; the design of which act is to annul every partial preference granted by a bankrupt, directly or indirectly,

If deeds are challengeable, where nothing is given away, but yet a partial preference effectuated?

in favor of creditors. It was answered, That the act mentions only *alienations* made by the bankrupt, and reaches not to every deed which may any way be attended with a consequential damage or benefit to some of the creditors. The Lords preferred the annual returns. Feb. 1728, Creditors of Graitney competing.

ONE having purchased an estate, and taken a conveyance to his author's disposition, with procuratory and precept, and having, thereafter, been concerned in the rebellion 1715, his friends, while he was prisoner in England, thought proper to infest the author, in order, if possible, to protect the estate from the government. The gentleman returning home without being attainted, contracted several debts, and conveyed to some persons, from whom he borrowed money, his author's precept for their security, not knowing that the same was exhausted, and infestment taken upon it in the author's person: At last, having died bankrupt, these creditors, adverting to the mistake, applied to the author, and obtained infestment from him; which being quarrelled, upon the act 1696, as granted by a trustee after the common debtor's notour bankruptcy, it was answered, The author was not here a trustee; the conveyance did not denude him of his personal right to the estate; he might have infest himself, and made a second conveyance in favor of another; and it is no objection, that he has exercised his power in favor of the bankrupt's creditors; nor can it alter the case, that infestment was taken in his name without his knowledge; this does not make him a trustee for the common debtor; he cannot be put in a worse situation without his consent; and therefore might lawfully use the infestment taken in his name, as if taken by himself for his own behoof. The Lords found the infestments, granted by the author, not reducible upon the act 1696. 21. June 1737, Beaton.

A DISPOSITION, by a bankrupt to a creditor, being reduced on the act 1696, and that creditor having done no diligence, (as others had done by arresting) trusting to his disposition; the Lords found the disposition to

Effect of this reduction.

fare

is simply null, that it could not even subsist to bring him in *pari passu* with the others. Fount. Dalr. 2. Dec. 1704, Man.—The like; 19. July 1728, Smith.—A disposition, by a bankrupt, to some of his creditors, was found null, *ab initio*, upon the act 1696, and was not sustained as a title to the bygone rents *in medio*, at the sentence of reduction. Forb. 8. Feb. 1706, Hamilton & Wishaw.

Disposition by a Bankrupt in favor of his whole Creditors.

A DEBTOR having disposed his estate in trust for payment of his creditors, it was found, That the trustee ought to make payment to the creditors *legitimo modo*, and not to those who had done no diligence in prejudice of the diligence of others. Stair, 24. July 1669, Crawford.—In a case that occurred before the act 1696, where a bankrupt, against whom the creditors were *in cursu diligentia*, after retiring to the Abbey, executed a disposition in favor of his whole creditors, on which investment was taken; this was argued to be no partial gratification, but a fair and honest deed, beneficial to the creditors, and saving them the expence of diligence, and so not reducible upon the act 1621. Answered, We are not here to consider a seeming equality introduced amongst creditors; but the precise ground in law is, That no deed of a bankrupt *postquam cessit foro*, and the creditors *in cursu diligentia*, can subsist; but he must leave his estate to be affected with diligence, and the creditors will be preferred accordingly, without regard to the disposition; and here the Lords are in use to make a difference between one insolvent, and a bankrupt. Where no diligence is done, a debtor may dispose his estate to his whole creditors, tho' his debts exceed his effects; but not where he is known to be a bankrupt, and diligence inchoat against him. The Lords found, That the common debtor, being a notour bankrupt at the time of granting the disposition, the same was null in law, and could not defend against the adjudgers. Fount. 9. Jan. 1696, Smart.—Disposition by a bankrupt to his whole creditors, equally and

proportionally, where no partial favor is done, each preferred according to his diligence, is not reducible upon the act 1621 and 1696. *Home*, 17. Nov. 1725, competition among creditors of *Watson*. 11. July 1726, competition of *Eymouth's* creditors.—A bankrupt, disposing of a subject, took the bond for the price payable to his creditors, with this special provision: *That the creditors should accept of certain funds in full of all their debts.* Before the acceptance of the creditors, arrestments were used in the hands of the debtor of the bond; and, in a competition, the Lords preferred the arresters, specially upon this medium. That the bond was conditional, depending on the acceptance of the creditors; but if the bond had been simple, and equally to all the creditors, the Lords would have preferred the creditors, tho' the bond had been taken in their names after the debtor's notour bankruptcy. 3. July 1724, Creditors of *Watson* competing.—A disposition by a bankrupt to trustees, in favor of his whole creditors, was sustained, notwithstanding a prior charge of horning, and the trustees preferred to the charger. July 1729, competition *Farquharson* and creditors of *Cumming*.—The contrary found; 28. Jan. 1735, *Mansfield*.—A bankrupt having granted a disposition of his whole effects to certain trustees for the behoof of all his creditors, in a reduction of the same, upon the act 1696; the reasons were, That a bankrupt was disabled from granting such a right, tho' not directly in preference of one creditor to another, yet indirectly, by putting all upon an equal footing, the most remiss with the most vigilant. 2do, The trustees were of the bankrupt's own naming, and his nearest relations, and these trustees are invested with most unreasonable powers, such as, To adopt creditors or not at their pleasure, to divide the price of the effects among the creditors, without being liable to any check, they being impowered so to do as arbiters, and in that capacity to determine also the expences of management: it is also declared, That they shall not be made liable for omissions; and lastly, That there is a forfeiture upon the creditor, who should quarrel or impugn the right granted to these trustees, or who should use separate diligence: the Lords found the reasons of reduction relevant, and,

at the same time, took this opportunity to declare their sentiments against all such dispositions in general, and, in that view, caused insert the following clause in their interlocutor, *And further, find, That no disposition by a bankrupt debtor can disable creditors from doing diligence.* 12. July 1734, Snee and Company.: The like found; 3. Feb. 1736, Earl of Aberdeen.

A BANKRUPT, having granted a disposition, *omnium bonorum*, to his creditors for their security and payment; one of them, not satisfied with the common fate, insisted on an adjudication against the bankrupt, which was strenuously opposed by the others, foreseeing this adjudication would be used as a foundation for pushing on a sale of the debtor's estate, which would heap a multitude of expences upon them, and tend, in the general, to render of no effect the method that has of late been fallen upon, of granting dispositions *omnium bonorum*: They pled; that this was an invidious diligence, that in all events their disposition must be preferable, whereby it will be impossible for him to make more by the adjudication than he has already by his right in the disposition; and therefore, that there was the same reason for stopping this diligence, as there is for stopping arrests and inhibitions, which is done every day upon equitable considerations: the Lords refused to stop the adjudication. Jan. 1729, Cheyne.

Decisions upon the clause, act 1695, declaring heritable Bonds, &c. to be, as if granted of the date of the sasines taken thereupon.

THE question occurring, with relation to an heritable bond, granted for ready money, sometime before the bankruptcy, but whereupon sasine was taken within the sixty days, whether this case fell under act 5th, parl. 1696? The Lords found, That the bond was to be considered as of the date of the sasine; and found, That the sasine, being taken within the sixty days, was void and null, as to the point of bankrupt, without prejudice to the personal obligation

If this clause concerns nova debita.

obligation in the bond. Dal. 29. Jan. and 12. Dec. 1717. Grant.—The contrary found, That the act 1696, anent bankrupts, reaches only securities given for former debts, not *nova debita*. Home; 19. Jan. 1726, Chalmers.—But thereafter, in a case fully debated, where an heritable bond was granted, *anno* 1721, for money instantly advanced, upon which infestment was not taken till Dec. 1727, within sixty days of the debtor's notour bankruptcy; the Lords found, That this bond, dated so long before the bankruptcy, fell under the act 1696, and that the clause of the said act, making the securities to be considered as of the date of the infestments, was not introduced in favor of the creditor infest; to make his bond still be considered as a new debt then contracted, of the date of the infestment, but was introduced altogether in favor of the other creditors, and *in paxam* of him who kept up his precept of *fasine* latent; and therefore found, That the bond is only to be considered as a personal security. 19. June 1731; Creditors of Merchiston.—The like found, where the heritable bond was dated, June 1727, and infestment not taken till April 1729. 25. Nov. 1735, Trustees of Matheson's creditors.—In a similar question, where the common debtor having right to an heritable bond, without infestment, upon a third party's estate, had conveyed the same to one of his creditors, who neglected to take infestment till within sixty days of the common debtor's notour bankruptcy; the Lords found, That this case did not fall under the act; because, whatever might have been the intent of the statute, the words respect only the case where infestment is necessary to denude the bankrupt, and when it goes this length it has a most valuable effect, and cannot, by construction, be extended further than the words will bear. Jan. 1734. Creditors of Scot.

SASINE being taken more than 60 days before the notour bankruptcy, but the same being

*Date of the
fasine, not of
the registration,
is the rule.*

ing registred within the 60 days, it was contended, That this brought the disposition within the clause of the act, declaring “dispositions, heritable

“bonds, &c. whereupon infestment

“taken within threescore days of the bankruptcy, shall

“only be reckoned as granted of the date of the *fasine*.”

The

the Lords found, That the date of the *sa*fine, not of the registration, must be the rule; and therefore recalled the reason of reduction. Dal. Bruce, 17. Feb. 1715, Creditors of Mr John Menzies.

A FATHER-in-law having granted a bond of anxiety to his daughter-in-law, the same was sustained, it being admitted that *Later decisions.* he had a sufficient free estate at the

date of granting thereof. Home, p. 334. Competition Creditors of Hay, 21. July 1742.

THE act 1696, was found not to take place in the reduction of a minute of sale, tho' the common debtor had been incarcerated six months before, and had allowed the purchaser to retain part of the price for the debt of another. Home, p. 366, Creditors of Hamilton, Feb. 9. 1743.

AN assignation was found reducible on the act 1621, the common debtor being under diligence, by horning prior thereto. Home, p. 417. Competition Woodrop, Feb. 1744.

A BOND of provision, granted by a husband to a wife, when he was insolvent, was restricted. Home, p. 438, Competition Auchinbreck, July 26. 1744.

AN irrational provision of L. 2000 to an only daughter, who was secured in the possession of an opulent fortune, was reduced upon the act 1621. Remark. Dec. p. 111, Creditors of Murray, July 18. 1745.

IT is wrong in common law, for a man in labouring circumstances, to do any deed purposely to prefer one of his creditors before another. Remark. Dec. p. 167, Grant, Nov. 10. 1748.

INNES, after the utmost diligence, by horning and option, obtained from James Johnston, his debtor, an irritable bond of corroboration, 17. July 1746. Upon the 16. August following, James Johnston was incarcerated at the instance of Nisbet of Dirleton's factor, with whom the bond was trusted to receive payment. The first notice Dirleton had of his debtor's imprisonment, was by a letter from the late Provost Coutts, bearing, that he himself was creditor to Johnston in a considerable sum; that he was in no pain for his debt, as he knew Johnston to be in good circumstances, and therefore begging that Dirleton would set him at liberty.

Dirleton

Dirleton made no difficulty to comply with this request, blaming, at the same time, his factor for his rigorous dealing. Accordingly, upon the 21. of August 1747, Johnston was set at liberty; and, of that date, granted to Dirleton an heritable bond of corroboration, which he had offered to the factor before his imprisonment. — This imprisonment must have given the alarm to the other creditors, had they entertained any suspicion of their debtor's solvency; but they entertained no more doubt of his solvency than Provost Coutts did. After this short interruption, he returned to his shop, and followed out his business as usual, for six months; during which period, he acted in every respect as a man of credit, carrying on his shop-business to as great an extent as ever; and, during this period, there was not the smallest attack upon him, an inhibition excepted, made by a Glasgow company to whom he was indebted L. 1000 sterling. He himself first declared his insolvency, by calling a meeting of his creditors in Jan. or Feb. 1748, laying a scheme before them, in which his debts were stated at L. 1200, and his saleable funds at L. 1100, without including his household furniture. Even at this meeting, James Johnston was left in the management of his own affairs till September 1747, that he disposed his real and personal estate to George Boswell, a writer in Edinburgh, for behoof of his creditors; who, in spring 1748, assumed the management by placing a factor. At last, in the beginning of the 1749, James Johnston's other creditors, finding a considerable sum coming, brought a process of reduction, on the act 10th against Innes and Dirleton, in order to cut down the preference. The libel was, "That James Johnston, who would be found insolvent, ought to be held to repute a notour bankrupt from the time of his imprisonment; and therefore, that the two heritable bonds granted by him, the one within three months of his bankruptcy, and the other after it, ought to be reduced." The court first assolvied from the reduction; but they altered this interlocutor upon a review, and found the two bonds reducible upon the act 10th. — The defenders, in a reclaiming petition, set out with an analysis of the statute: and *first*, that a dyvor, or

pt, was a man who gives over his business for want of credit or stock, *qui cessit foro* ; consequently that a man who has credit, and carries on business, cannot be a dyvor bankrupt. But between these extremes there being several circumstances to make it doubtful whether a man can be a bankrupt or not, such as lurking, forcibly depending, &c. it was argued that it was partly the view of this statute to remove these doubts, and to ascertain the precise intermediate circumstances that should give a man the character of a dyvor or bankrupt. That another view was to extend the remedy against fraudulent or partial alienations. That by the law, as it formerly stood, such deeds could only be cut down which were granted after actual bankruptcy. That the statute 1621 prevented partial preferences after diligence commenced : but this not being a perfect remedy, because debtors, finding themselves in a declining condition, did often lay hold of that opportunity to make up matters with their favorite creditors. That the statute 1696 extended the remedy against all deeds granted 60 days before actual bankruptcy. That these were clearly the views of the statute ; and it was framed to answer these views. That after ascertaining those circumstances, which should infer notour bankruptcy, and which before were doubtful, it goes on to enact, That, after a man is a notour bankrupt, every deed done, during his notour bankruptcy, and 60 days before, shall be void and null. But to cut down such deeds, the man must have the character of bankrupt, without interruption or discontinuance down to the process. That the words of the statute, holding and reputed the defender to be a notour bankrupt, " from the time of his foresaid imprisonment, retiring, flying, &c." plainly supported a commencement of the present bankruptcy, which, from the very idea of commencing or beginning, must infer " a continuance in the same state : " and the same was implied in the subsequent words, " declaring all and whatsoever voluntary dispositions, &c. made by the foresaid dyvor or bankrupt, either at his becoming bankrupt, or for 60 days before, in favors of creditors, to be void and null." The judges adhered. They considered, that as the common debtor was rendered bankrupt by incarceration, in terms of the statute, the few months in which he was allowed his liberty, was
no

no such interruption as to make the posterior surrender of his effects be considered as a second bankruptcy. Remark. Dec. p. 241, Hopton, 9. Nov. 1750.

THE clause in the act 1696, declaring dispositions, heritable bonds, &c. to be of the date of the failure, does not concern *nova debita*. Remark. Dec. p. 246, Johnston, 29. June 1751.

NOR bankrupts who are not infest, *ibid.*

AN act of warding was found ineffectual for making a man bankrupt, in terms of the act 1696, Falc. vol. I. p. 4. Snodgrass, 13. Nov. 1744.

TO make a person bankrupt, by taking the sanctuary, it is necessary he be marked in the abbey books, Falc. vol. II. p. 292. Dickson, 3. Dec. 1751.

A DISPOSITION by a bankrupt, with a resignation *ad remanentiam*, was held of the date of the instrument, Falc. vol. II. p. 101. Mitchel, 7. Nov. 1749.

A PERSON insolvent, and under diligence, by horning and caption, was apprehended by a messenger, but discharged on payment; this was not found equivalent to imprisonment, in the sense of the act 1696, Falc. Col. vol. I. p. 206, Creditors of Woodstone, 18. Feb. 1755. This was reversed on appeal.

PATRICK and James Jacksons, having become bankrupt, and their creditors having, upon different diligences, carried off the greatest part of their effects, the Jacksons, at a general meeting of almost all their creditors, except Alexander Simson, executed a disposition of the remainder of their effects, to Robert Sym, as trustee for all their creditors. The disposition was simple, unqualified; reserved the several rights and preferences of the creditors; enumerated them all; referred to a signed inventory of the debtors effects; and contained none but the most common and ordinary clauses necessary for its receiving execution.—In consequence of this disposition, the creditors stopped their diligences.—Two months after, Alexander Simson, who had not used any diligence before, arrested in the hands of Robert Sym for a debt due to him by the Jacksons. The sheriff decerned in the forthcoming; Robert Sym advocated the cause.—Simson pleaded, in the advocacy, That a disposition *omnium bonorum* by a bankrupt, could not stop the diligence of creditors.—Sym made

answer

answer upon the common argument made use of, in support of such dispositions. And, *2do*, That the case in hand was more favorable than the common case of such general dispositions; for that it was only a conveyance of the remaining part of the bankrupt's estate, after the greatest part of it had been torn away by diligence; and that, even of it, the division had, before the meeting of the creditors, been already fixed by the diligences which the creditors had by that time used, in which those who had diligences had only an interest, and in which Simson had no interest, it not being denied, that if the other creditors had gone on in their diligences, without using the trust-disposition, there would not have been left any thing for him to have drawn. "The Lords assilzied Robert Sym."

Fac. Col. vol. II. p. 97. Sym, 16. Nov. 1757.

HERITABLE bonds, obtained from a person insolvent, by confident persons, were found to give no preference in competition with a posterior adjudger, but the whole were brought in *pari passu*. Fac. Col. vol. II. p. 164. Munnand, 31. Jan. 1758.

A DEED, by a Scots bankrupt, granted in England, was reduced upon the act 1696. Fac. Col. vol. II. p. 11. Sym, 6. July 1758.

WILLIAM SCOT and Benjamin Bell carried on for many years, a trade of purchasing cattle in Scotland, and selling them in England, which began in the year 1720. In 1727, they acquired from John Somervel, equally between them, an heritable debt on the estate of Crowdiknow for L. 350, upon which Somervel had been seised. The heritable bond, and conveyance in their favor, was produced in the ranking of Crowdiknow's creditors. Upon the 8. April 1745, a final clearance was made between them, by a fitted accompt, in which the whole of this debt was stated to the debit of Bell, and after stating every other article, the balance came out due to Scot by Bell L. 454. A disposition was the same day executed by Scot in favor of Bell, of Scot's share of this debt, assigning him to Somervel's precept.—Bell afterwards paid to Scot the balance due by the accompt. In the year 1746, Bell put Scot's disposition into the general register. In 1748, Scot became a bankrupt in terms of the act 1696. In July 1749, Sir Wil-

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liam Maxwell, as creditor to Scot, arrested in the hands of Graham, purchaser of Crowdiknow, in order to affect Scot's share of the annualrents of this debt; and in Feb. 1750, obtained an adjudication against Scot, in order to attach the debt itself. In July 1750, Bell took infestment upon Somervel's precept, which, as to Scot's share of the debt, proceeded upon the disposition 1745. Sir William Maxwell brought an action of forthcoming upon his arrestment, in the course of which, he also produced his adjudication. Benjamin Bell appeared, and claimed to be preferred upon his disposition from Scot, completed by infestment in July 1750. — Pledged for Sir William Maxwell, By the statute 1696, all voluntary dispositions by a bankrupt in favor of a creditor, within sixty days before his bankruptcy, in preference to other creditors, are declared null. And it is further declared, " That all dispositions, heritable bonds, or other heritable rights, whereupon infestment may follow, granted by the foresaid bankrupt, shall only be reckoned as to this case of bankruptcy, to be of the date of the sasine, lawfully taken thereon. The disposition by Scot to Bell, must therefore be held as of the date of the infestment taken in July 1750, which was two years after the bankruptcy. *2dly*, Sir William is at any rate preferable upon his arrestment to the annualrents of the debt preceding July 1750, when the arrestment was used, because the disposition in favor of Bell was not completed by intimation of infestment before that time. — Answered, *1st*, The act 1696, only applies to dispositions, or heritable bonds, which contain an immediate warrant for infestment; whereas the disposition by Scot to Bell, conveyed on Somervel's precept, upon which the infestment was afterwards taken. Besides, the disposition by Scot was not granted for security of a prior debt, but for money soon after advanced by Bell. At any rate, the act 1696 cannot apply to this case: for the heritable debt in question, was a copartnery subject, and, at clearing the copartnery accounts, was conveyed to one of the partners, as a distribution of the company-effects; which could not be overturned by the subsequent bankruptcy of either. — *2dly*, If Bell has right to the heritable debt itself, he must also have right to the annualrents: his disposition

disposition in his favor was sufficient to divest Scot with-
 out intimation, and must carry the debt and all its ad-
 vantages.—Replied, It is true, that it was found, in
 January 1734, Creditors of Scot of Blair, that the act
 1696, did not apply to the case of dispositions, not con-
 taining immediate warrant for infeftment: that judge-
 ment, however, proceeded upon a principal of law, the
 contrary of which was afterwards established. It was
 at that time held to be a principle of law, that such dis-
 positions did completely denude the granter. This had
 been found, 20. Nov. 1733, Sinclair; but it was after-
 wards adjudged and established, 22. June 1737, Bell of
 Blackethouse, that a posterior disponee, to such kind of
 rights, completing his title by infeftment upon the pre-
 cept assigned, was preferable to a prior disponee, as
 being the first who completely denuded the granter:
 and it must follow, of consequence, that in this case
 Bell had not denuded Scot, or completed his right, till
 July 1750, after Scot's bankruptcy. Supposing the con-
 veyance by Scot to Bell to have been granted for a sum
 advanced, or soon after paid, this would not be a good
 defence against the reduction on the act 1696; as will
 appear by the decisions, 29. Jan. and 13. Dec. 1717,
 Grant. And, upon that point, after a contrary decision,
 19. Jan. 1726, Chalmers, there followed two other
 cases in terms of the first decision, 19. June 1731, Cre-
 ditors of Merchiston. 25. Nov. 1735, Trustees of Ma-
 chieson's creditors. In each of these three cases, the
 distinction between *nova debita* and prior debts was re-
 spected. Neither is the pretext of a copartnery a good
 defence: for in this case, there appears to have been
 no permanent company between Scot and Bell, but a
 joint trade carried on from year to year, and the profit
 annually divided. At any rate, this heritable debt was
 no copartnery subject, but disposed to them by Somer-
 sel, not as partners, but equally between them; and
 it was not conveyed by Scot to Bell as a distribution of
 the company-effects, but, in some measure, sold to him
 for money he was afterwards to pay. 2dly, As to the
 annualrents, the disposition in favor of Bell did not de-
 nude Scot, till infeftment was taken; and therefore, till
 then, the disposition only imported an assignation as to
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the annualrents, which was not completed by intimation till after the arrestment; for the date of a disposition not completed, can have no effect in a question with third parties. In two similar cases, an arrestment was preferred, as to the rents of lands, to a prior disposition, upon which infestment was not taken till after the arrestment. 22. Nov. 1633, Warnock, 24. June 1642, Forrester.—The court seemed chiefly moved by the defence founded on the copartnery. The Lords found That Benjamin Bell was preferable to Sir William Maxwell, as to the principal sum and annualrents in question. Fac. Col. vol. II. p. 268, Maxwell, 20. Dec. 1758.

A SALE of growing corns, by an insolvent person to some of his creditors, was found to transfer the property so as to exclude the posterior diligence of another creditor. Fac. Col. vol. II. p. 274, Grant, 21. July 1758.

A DISPOSITION by a bankrupt to trustees for behoof of his whole creditors, was found not to entitle the trustees to stop adjudications at the instance of creditors who had not acceded to the trust-right. Fac. Col. vol. II. p. 345, Forbes, &c. July 25. 1759.

PAYMENT made by a bankrupt to a creditor, without fraud on the creditor's part, was found not challengeable. Fac. Col. vol. II. p. 444, Bean, 1. Aug. 1760.

A BILL, granted by the indorser of a former bill which had been protested for not payment, for the contents thereof, and interest, re-exchange and charges, was found not to fall under the act 1696, relative to notes of bankrupts. Fac. Col. vol. III. p. 167, Cowan, 7. Jan. 1761.

A DISPOSITION, *omnium bonorum*, by a bankrupt to a trustee, for behoof of all his creditors, sustained in the effect of being a good disposition to them. Fac. Col. vol. III. p. 177, Wilson, &c. 18. Feb. 1762.

A TRUST-RIGHT, granted by a bankrupt in favor of his creditors, found preferable to particular arrestments. Fac. Col. vol. III. p. 280, Jamieson, Nov. 16. 1763.

IN the year 1759, Elizabeth Mudie, lent to Robert Strachan, merchant in Montrose, the sum of L. 210, for which she received his bond. Strachan becoming embarrassed in his circumstances, on the 11. June 1762, executed a disposition in favor of James Dickson and James Michel, for themselves, and as trustees for the rest of his

editors, of all his effects, both heritable and moveable. This disposition was acquiesced in by all concerned, Elizabeth Mudie excepted, who never gave her consent, but went on to operate her payment in the ordinary course of law. On the 7th of June she executed a horning against the debtor, and afterwards used arrestment in the hands of the trustees, who were then in possession of a great part of the debtor's effects, and also in the hands of two other gentlemen who were owing him considerable sums. On the 30th of the same month, she raised a capion against him, and obtained five executions of search, four of which were within sixty days of the date of the disposition to the trustees. The trustees, in consequence of the trust-right, disposed of the debtor's effects; but, before they had made any division of the value, two processes were brought by Elizabeth Mudie, the one for reduction of the trust-disposition upon the bankruptcy-acts, and the other a forthcoming against the trustees, and the two other gentlemen in whose hands she had used arrestments. In bar of these actions, three points were pleaded by the defenders: 1st, That Robert Strachan was not rendered a bankrupt in terms of the act 1696, as the several executions of the messengers who searched for him, only bore, that he was not to be found at his own house, from which he had removed, and the furniture whereof had been roused sometime before the search began; and as he had made several public appearances in the town of Montrose, had frequently transacted business in that place, and had never behaved himself like a man who was under the apprehension of legal diligence: 2^{dly}, Upon supposition that he was rendered a bankrupt within sixty days of the trust-deed; that the truth of this ought not to operate a reduction of the disposition, as it was evident, from the spirit and words of the act 1696, that the legislature only intended to prevent partial preferences in favor of particular creditors, and not to render ineffectual dispositions that were granted for the good of all concerned, without any unfair advantage being intended to individuals: That the trust-right here was conceived in favor of two creditors, for the behoof of the whole, without any reference to them prejudicial to the rest. And, 3^{dly}, That,

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That,

That, tho' the dispositions were reducible, the pursuer could be intitled to no preference on that account, as the rest of the creditors had been prevented from employing the same diligence which she had done from an opinion that the disposition was a sufficient security, and incapable of being reduced; at least that the defenders were intitled to retain the goods or prices thereof, of which they were lawfully possessed before the pursuer's arrestments, for behoof of themselves and other lawful creditors accepting of the disposition, without prejudice to the pursuer's taking his share thereof. It was *answered*, on the part of the pursuer, That Strachan was rendered a bankrupt precisely in the terms of the act of parliament: That the executions of the messenger were a sufficient evidence in such a question as this, and could not be over-ruled by contrary circumstances being proven, a proof which was altogether unprecedented and incompetent. That the different searches at the debtor's house were all that could be required; and that his family having left it, on account of his furniture being disposed of, was intirely immaterial: for his children were dispatched to different places: he himself was wandering up and down the country, to be found no where that he was looked for, and destitute of any residence or domicile, except his former habitation, where legal diligence could be executed against him: In fact, however, he had been searched for at his father-in-law's house, where he was suspected to be; but this search proved ineffectual, as appears from the execution produced. That his public appearance in Montrose was mostly on a Sunday; and, when he once appeared on another day, he was obliged to make his escape by a back-lane, otherwise he would have been apprehended. *adly*, That the words of the act of parliament were general, and intended to frustrate every alienation or other deed done by a bankrupt, within 60 days of his bankruptcy, whereby he might diminish the right of one or more of his creditors in favor of the rest: That the law introduced a preference in favor of such creditors to follow the measures thereby pointed out for recovery of payment of their debts; and it would be unjust if an act of the bankrupt could deprive a creditor of this preference.

ference, without his own consent: That the disposition in question was never acceded to by the pursuer, and consequently was reducible at her instance. 3dly, As to the hardship with which it would be attended to those creditors who had acquiesced in the disposition, that was a matter of no concern to the pursuer. They had themselves only to blame, if they trusted to a false security, and with-held their diligences, from an opinion that a deed would stand, which they either did know, or ought to have known, was illegal and contrary to law; and if the trustees were to be allowed to retain the effects which they had become possessed of, it would resolve into a repeal of this salutary act; for every creditor whom the bankrupt intended to favor, would only have to get himself named a trustee in such dispositions, and thereby would have an opportunity, not only to secure his own debt, but also to make profit to himself by simulate sales, and other arts, in the management of the effects conveyed to him. The Lords repelled all these defences; found the bankruptcy proven; reduced the disposition; and preferred the pursuer, in virtue of her diligence, to the effects in the hands of the trustees, and of the other persons in whose hands arrestments had been used. Fac. Col. vol. III, p. 353, Mudie, 14. Nov. 1764.
Compare Cessio Bonorum under Prisoner.

BANKRUPTCY *receivable by reduction or exception.*

See Competent.

ALIENATION *in favor of a conjunct or confident person, what evidence requisite of its onerosity? See proof.*

WHO *are understood conjunct persons? Ibid.*

PROVISIONS *granted in favor of children or other relations, when understood fraudulent, so as to be reducible upon that head by creditors. See Fraud.*

BASE INFESTMENT.

A **BASE** infestment not null for want of possession, albeit excluded by a public infestment before possession. Stair, 16. Jan. 1663, Tenants of Kilchattan. *How far effectual without possession?*
 — Good against the granter and his heirs, tho' neither registred nor clad with possession. Home, 26. Jan. 1726, Marquis of Clydesdale.

740 BASE INFESTMENT.

Clydesdale.—Without possession, is sufficient to exclude the terce; for, as to the husband's heir or relict, it is a sufficient right. Stair, Gosf. 27. Jan. 1669, Bell.

A BASE infestment was preferred to a public one, as being prior, because there being no more than a year since the date of either, the base infester had, immediately after the first term, intented action, whereby he had done all lawful diligence to make his right public; since

before the term he could have no action for annualrent. Dur. 13. Feb. 1624,

The same found in a competition between an annualrenter and a feuer of the lands, where both infestments were base, and the latter had attained possession, but the former had done all proper diligence to attain it. Dur. 2. July 1625, Raploch.—The like; Stair. 26. July 1676, Alison.—A base infestment being taken, 28. June 1655, and a public infestment, on a comprising, taken the very next day thereafter, in the question about the preference, the compriser alledging, that the base infestment could not be clothed with possession till the Martinmas thereafter, and that there was a *medium impedimentum interveniens*; and the base infester alledging, that the act 1051 parl. 1540, against base infestments, was only to take place where they were simulate, which this was not, and offering to prove, that it was clothed with possession at the Martinmas first subsequent to the sasine, which was as soon as could be, so that he was not *in mora*; the Lords sustained this as relevant to prefer the base infestment. Home, Nov. 1686, Fount. 25. Jan. 1687, Ramsay.—A base infestment of annualrent being granted, to take effect after the granter's death, and upon which a decree of poinding the ground followed, during the granter's life; this decree, upon which possession could not follow, as being before the term of payment, was sustained, to make the base infestment public; so, as to compete with other public infestments. Stair, Giln. 27. Feb. 1662. Creditors of Kinglassy competing.—A tenant obtained from his master, an infestment of annualrent out of the lands before Whitsunday; but the first term's payment of the annualrent was Martinmas thereafter. Between Whitsunday and Martinmas, a creditor apprised the

the land, charges the superior, and thereupon insists for mails and duties. It was argued, That the annualrent was clad with possession before the apprising, in respect that the annualrenter, by virtue of his tack, was in the natural possession from the very date of his sasine; and that *intus habuit*, since he did retain his own annualrent, which became due from the date of the sasine *de momento in momentum*; so that as the getting payment from the possessor of any part of the annualrent, would be a sufficient possession, the annualrenter retaining the same in his own hand as possessor, is equivalent, which was found relevant. Stair, Gilm. 30. June 1666, Stevenson.

A DECREET of pointing the ground, against the tenants and possessors, tho' the heritor was not called, found sufficient to validate a base infestment. Stair, 15. June 1666, Sir Robert Sinclair.—Base infestment found validate from the date of the citation for pointing the ground.

Process of mails and duties, or pointing the ground, makes it public.

Stair, 26. June 1662, Wilson. Stair, 27. Jan. 1669, Bell. Stair, 24. Jan. 1679, Hamilton.—The bare execution of summons of mails and duties is sufficient to make a base infestment public. Fount. 16. July 1700, Creditors of Langton competing.—And the citation of a few tenants was found as sufficient as if the whole had been cited, for all the baronies contained in the base infestment, tho' distinct and not united. Harc. (*infestment*) Dec. 1691, Ranking of Creditors of Lanton.—A man having given infestment of annualrent forth of his lands, to a conjunct person to be holden of himself, altho' the party raised letters for pointing of the ground, yet no possession having followed upon the infestment, a stranger buying the land thereafter, was found to exclude the annualrenter, who was *in mora*, and never attained natural possession. Had. 19. June 1605, Douglass.

A BASE infestment of property, clad with possession, preferred to a base infestment of annualrent, tho' confirmed by the King before possession was attained upon the former, in regard the confirmation could not make the infestment public, because it was given to be holden of the granter only, and not of the superior.

Confirmation makes it public.

superior. Dur. 17. Nov. 1627, Clackmannan.—The like; *penult.* Jan. 1628, *inter eosdem*.—A confirmation in exchequer is not a complete deed till the seal be appended, and therefore, a base infestment made public by citation, in a poinding of the ground, was preferred to another infestment confirmed before it, and sealed only about an hour after the citation. *Hare (infestment)* 9. Dec. 1691, Fenton.

FOUND that a base infestment is clothed with possession by payment of the annualrent

Payment of annualrent makes it public.

to the creditor several years, tho' not paid out of the lands affected, nor by the tenants, but personally by the grantor. Dur. 18. July 1626, Lady Glen

garnock. Dur. 11. Feb. 1642, Monteith.—The Lords found a base infestment sufficiently clothed with possession, by a discharge, bearing only receipt of the annualrent of the personal bond, but having no relation to the heritable right on which the sasine followed, as being paid out of other lands than these out of which it was upliftable. Fount. 21. Feb. 1696, Creditors of Cunnochie.—The receipt of a small sum, far within a term's annualrent, was found to validate a base infestment of annualrent, tho' it did not specify the infestment, and tho' there was more than that sum due of annualrent upon the personal bond, before the date of the infestment. Stair, 23. July 1667, Home.—A party being infest in an annualrent base, and, before he attained possession, another having adjudged, but the infester getting a year's annualrent before the adjudgement was publicly infest, the Lords preferred the annualrenter. Home, Jan. 1682, Nisbet.—An heiritor having paid a year's annualrent to a base infester, and taken assignation thereto, the Lords found this equivalent to a discharge, he being heiritor and possessor of the fundus, which was properly debtor in the annualrent; and being their Lordships thought that any thing was sufficient to clothe a base right with possession among strangers, seeing the 105th act, parl. 1540, levels only against alienations made among near friends, and where there is ground to suspect simulation. Fount. 20. Dec. 1691, Badinsoch.—Payment of a term's annualrent of a bond whereupon sasine did not follow till after the payment

as found to make it public, *quoad* a donatary of life-
ent escheat, whose right was posterior. Gosf. 14.
an. 1669, Clarkson, 6. Feb. 1669, *inter eosdem*.—The
contrary had been found in a competition with an ap-
paiser. Dur. 24. Feb. 1636, Oliphant.

A WIFE's infestment, for security of her jointure, can-
not be clad with possession during her
husband's life; therefore the husband's
possession is understood to be her pos-
session, and her infestment accordingly
preferable of its date. Gilm. 15. Jan.

*Husband's
possession, the
wife's possession,*

1663 Campbell. Stair 23. Nov. 1664. Nisbet. Dur. 8.
Mar. 1622, Corfinday. Spot (*Conjunct-fee*) 15. Feb. 1631,
Huttonhal.—This holds, tho' the husband be not in the
natural possession himself, but possesses by any deriving
temporary right from him, such as tenants, wadset-
ters, &c. Stair, 18. Dirl. 17. July 1667. Burgie.—
The like, where the husband's mother, a liferenter,
was in the natural possession Stair, Dirl. Gosf. 21.
Feb. 1672, Reid.—And the father disposing the fee
to his son, reserving his own liferent, his possession was
found sufficient to clothe his daughter-in-law's right
with possession, tho' that seemed to be *duplex fctiq.*
Fount. 14. Feb. 1696, Reres.—In a competition be-
tween an adjudger infest, and the common debtor's re-
lict infest base, upon her contract of marriage, the ad-
judger was preferred, in respect the brocard, that the
husband's possession is the wife's possession, will only
hold while he is alive; and here the relict, after her
husband's decease, neglected to insist for possession, or
to publish her right. Fount. 11. Jan. 1698, Stodart.—
In a competition between the donatary of a forfeiture
and the rebel's relict, touching her jointure, she alledg-
ed, that her right of liferent was public, as being re-
served in the body of her husband's infestment, tho'
the charter and sasine (which only makes the right pub-
lic) bore nothing of her liferent; the Lords, in re-
spect of the favorableness of a jointure, found this ge-
neral reservation equivalent to a confirmation, and so
referred her to the donatary, who, in strict law, (says
the author) had much to say. Fount. 17. March 1685,
Earlstoun.—A tack was preferred to a base infestment
given by the setter to his wife thereafter, tho' her sa-
sine

fine was taken before the tacksmen obtained possession in respect he obtained it before the setter's death, and the setter's possession was not accounted his wife's possession so as to clothe her infestment, and make it valid from the date. Dur. 23. July 1628, Ednem.

A SON being infest, and holding of his father, the father's possession, upon a reservation, was not found to be the son's possession: For the Lords thought, the possession by such reservation between father and son were sufficient, the

Father's possession, if the son's possession?

creditors could hardly be secure. Dur. 17. July 1635, Craighall. Dur. 26. June 1634, Bruce. Stair, 14. June 1666, Home.—The like; 18, Dec. 1666, Newbeath. See also a similar case, 10. July 1669, Gardner.—The contrary was found, 16. Jan. 1730, Barrilay of Busbie.—A father granted, at the same time, two base infestments to two of his sons, reserving in both his own liferent; in a competition between the singular successors in these base rights, it was found, That the father's possession, by reservation of his liferent, did sufficiently validate both infestments; for, in this case there could be no ground of simulation, which is always presumed in rights granted to children, when competing with onerous creditors. Stair, Gosf. 39. June 1668, Skein.

THE heritor's possession by a back-tack, was found to validate a base infestment of wadset, unless payment of the back-tack-duty had been obtained. Stair, 11. Jan. 1678, Laurie. Dur. 11. July 1628, Collington.

Reverser's possession, if the wadsetter's possession?

POSSESSION

Possession of the principal lands, is possession of the warrandice lands.

Infestment of relief, if valid without possession?

of the principal lands, is possession of the warrandice lands. Stair, Dm. Gilm. 9. Jan. 1666, Brown.—The same found, tho' warrandice was granted in *intervallo*, and not in the same infestment with the principal lands. Stair, 20. Feb. 1668, Forbes.

A BASE infestment, granted for relief of cautionry, is not valid without possession; and therefore, such are not in the same case with base infestments.

of warrandice, where the possession of the principal lands
fictione juris, a possession of the warrandice lands,
 Stair, Gosf. 26. June 1677, Inglis.—Found that an in-
 festment of relief, tho' base, yet being a complete right
in suo genere, was preferable without possession to a po-
 sterior public voluntary infestment. Home, Feb. 1682,
 Ornce. And again, Home, March 1682, Earl of Kin-
 cardine's creditors competing.—Infestments of relief are
 not public from the date, nor from the time of distress,
 until possession be apprehended, and any posterior in-
 festment public before the said possession (tho' interven-
 ing between the date of the base saline and distress) is
 preferable. Harc. (*Infestment*) 1. July 1691, Ranking
 of the Creditors of Lanton.

IN a competition between a prior base infestment, and
 posterior public one, this having ne-
 ver attained possession, but the former *Possession of a*
 having possessed the greater part of the *part, if it vali-*
 lands, this was found sufficient to de- *dates as to the*
 fend against the public infestment for *whole?*
 the lands, whereof the defender was

never in possession, as well as those he possessed, because
 the infestment was indivisible. Dur. 14. Jan. 1630,

Munter.—A base infestment of annualrent, out of two se-
 parate tenements, is validated as to both, by uplifting
 tails and duties from the tenants of either. Stair, 6.

Nov. 1678, Miln.—Found, That a cautioner's paying
 annualrent did clothe an infestment with possession of
 the principal's lands, and, *e contra*, as well as if it had
 been got from both. Fount. 27. Nov. 1678, Reid.—A

father, infesting his second son in an annualrent out of
 his lands, effecting to an accumulated principal sum, the
 one half whereof was borrowed money, and the other
 his portion, it was found, That the said infestment, if
 clothed with possession, as to the half (*viz.* the borrowed
 money) is public *in solidum*, tho' the son had not, nay,
 could not, attain possession as to the other half, the an-
 nualrent being only to commence at his father's death,
 which had not yet happened. Dirl. 5. Feb. 1668,

er.—Possession, upon an infestment of corroboration,
 was found to validate the original infestment of an-
 nualrent, which was granted out of other lands. Stair,
 Gosf. 9. July 1668, Alexander.

COMPETITION of a base infestment with a liferent escheat. See *Escheat*.

CONFIRMATION, in what case it makes a base infestment to hold of the superior confirming. See *Confirmation*.

BASTARDY.

Bastard's children succeed to him.

FOUND, that the king has no right to any of a deceased bastard's goods, if he leave a lawful child who may succeed to him as heir, altho' he leave no heritage. Bal. (*Bastards*)

Sinc. 11. and 17. Dec. and 24. March 1546, Dundasfeator.—The same; Bal. (*Bastards*) 7. Dec. 1563. Auld.

LANDS being disposed to a man in liferent, and his bastard in fee, and, failing heirs-male, of the bastard's body, to a third party; upon the bastard's decease without heirs-male, the Lords reduce a gift of bastardy made by the king

Strangers may succeed as heirs of provision.

to another, and found that the law, *quoad bastardum non potest habere heredem, nisi de corpore suo legitimum procreatum*, is to be understood only of the legal heirs, not of heirs of provision. Spot. (*Bastard*) Col. March 1584, Innes.

IF the bastard was married, and died without children, the gift of bastardy will only carry the one half of the goods, the other being long to the wife. Sinc. 3. March 1541, Earl of Errol. Dur. 7. July 1629, Wallace.—A bastard leaving

Bastard's relict has her legal interest.

wife, but no children, the king's donator has right to the whole heritage and heirship moveables, as also to the half of the other moveables, he finding caution to pay the bastard's debts, funeral charges, &c. Bal. (*Bastards*) 18. Feb. 1502, Relict of William Murray. Spot. (*Bastard*) Mait. 29. July 1566.

IF the lawful issue of the bastard at any time fail, their goods become caducary, and return to the king by the right of *mus heres*, with respect to such subjects as were established in their person

If the bastard's issue fail.

and by the right of bastardy, with respect to such subjects, wherein they died in the state of apparent heirs to the bastard, Dur. 13. July 1626; Halcro.

A BASTARD, having no lawful issue, has no power of testing, and can neither nominate executors, nor leave legacies, unless he obtain legitimation from the king.

Stair, 18. June 1678, Commissioners of the shire of Berwick.—Found, that a bastard, tho' not legitimate, may leave tutors to his children, who are to succeed to his means, and that he may nominate them executors; altho' it was alledged, that a bastard, not legitimate, notwithstanding he had lawful children, could not have *testamenti factionem*; and that, if he nominated them his executors, yet their succession would not be *ratione testamenti*, but *ratione sanguinis*, which was repelled, because, if the bastard should have a plurality of children, and nominate one of them executor, that child would have right only *jure testamenti*; for if it were *jure sanguinis*, they would all succeed alike. Dur. 8. March 1628, Muir and Thomson.

IF a bastard obtain from the king power of testing, his legator will be preferable to the donator of bastardy.

Dur. 7. July 1629; Wallace.

LANDS, or goods, of a bastard, or person deceasing without an heir, pertain not to the lord of regality, unless specially expressed in his infestment. Had. June 1601, Buchanan.—The like; Had. 18. Feb. 1612, Sibbald.

A DONATARY of bastardy found only liable *secundum vires hereditates*. Fal. 24. Nov. 1685, Galbraith.

A BASTARD may convey his effects by a general disposition, if it is not of a testamentary nature. Home, p. 209. Ewing, 20. July 1739.

THE mother is preferred to the custody of a bastard child. Fac. Col. vol. II. p. 188. Burges, 4. March 1758.

Mr JOHN GOWDIE having obtained from the crown a gift of *ultimus heres* to the lands of Maison-Dieu,

Bastard has not testamenti factionem, unless he leave lawful issue.

Or unless he be legitimate.

If the bastard's effects fall to the lord of regality?

Donator of bastardy how far liable to creditors?

Later decisions.

Dieu, the property of the deceased Margaret Morison
 who, he alledged, had died without heirs, John Ram-
 say brought a declarator to exclude this gift, in respect
 that Margaret Morison had not died without heirs, and
 that he was next heir to her. He connected his relation
 by showing, that Margaret Morison was descended from
 and heir to, James Morison, who was her great grand-
 father ; and that he himself was descended from, and heir
 to Marjory Morison, the only sister of this James.—Gow-
 die's defence was, That James Morison was a bastard,
 and, consequently, that Ramsay could not succeed, ei-
 ther to him, or to any of his descendents ; because, by
 the law of Scotland, a bastard can have no heirs except
 those of his own body. To obviate this, John Ramsay
 produced letters of legitimation in favor of James Mo-
 rison, of date 30. June 1625. These letters are in the
 common style ; and in them King Charles I. gives and
 grants, to James Morison, in the following words :
 “ Plenariam potestatem, liberam facultatem, et licen-
 “ tiam specialem, ut ipse libere et licite disponere valeat,
 “ quovis tempore vite sue, sive æger fuerit, sive sanus,
 “ sive in tempore mortis sue, de omnibus et singulis ter-
 “ ris suis, tenementis, annuis redditibus, assedationibus,
 “ prædiis et possessionibus, ubicunque, infra dictum reg-
 “ num nostrum, sive extra idem, existen. ; ac de omni-
 “ bus et singulis bonis suis, mobilibus et immobilibus, qua-
 “ sitis seu quærendis, cuicunque personæ, vel quibuscun-
 “ que personis, prout ipsi magis videbitur expedienti,
 “ conveniens, et opportunum, non obstante bastardia
 “ in qua genitus et natus est, et privilegio juris nobis
 “ super bastardorum eschetis concessi ; ac etiam ipsum
 “ Jacobum Morison ad omnimodos actus legitimos, in ju-
 “ dicio, et extra judicium, exercendi, dignitatibus, baro-
 “ nitatibus terris, privilegiis, honoribus, officiis, et posses-
 “ sionibus gaudendi, in omnibus, et per omnia, sicuti de
 “ legitimo thoro procreatus fuisset, legitimum fecimus, et
 “ nostræ Regiæ Majestatis plenitudine, legitimamus.—Et
 “ si contigerit, dictum Jacobum Morison, sine legitimis
 “ hæredibus de corpore suo procreatis, vel sine disposi-
 “ tione, per ipsum, de terris suis et bonis antedictis,
 “ facta, in fata decedere ; nos, ex nostrâ regia pote-
 “ state, et autoritate regali, volumus et concedimus, et
 “ pro nobis et successoribus nostris, decernimus et or-
 “ dinamus.

dinamus, quod propinquior agnatus vel cognatus suus, ex parte patris vel matris, erit ipsius hæres, eique, in omnibus suis terris, redditibus, possessionibus, et bonis hæreditariis, inobilibus et immobilibus, habitis et habendis, succedet, et ad eadem, per brevia capellæ nostræ regiæ, introibit, simili modo, et adeo legitime, vigore hujus nostræ legitimisationis, ac si prædictus Jacobus Morison de legitimo thoro procreatus fuisset, vel hæredes de corpore suo legitimo procreatos habuisset, aut super dictis terris et bonis suis in vita sua disposuisset, sine aliquo obstaculo, revocatione, impedimento, clameo, quæstione, vel contradictione nostri, vel successorum nostrorum, præfato Jacobo Morison, aut personæ vel personis cui vel quibus ipsi, de præfatis terris suis, tenementis, annuis redditibus, possessionibus, vel bonis, disponere contigerit, siue propinquiori agnato vel cognato suo, ex parte patris vel matris; quibus deficientibus, legitimis hæredibus de corpore suo; vel dispositione, per ipsum, in vita sua, ut præmittitur, minime facta, in terris, hæreditatibus, et bonis suis, antedictis, succedet, quovis modo inde fiendi in futurum, non obstan. juris privilegio nobis super eschetis bastardorum, ut præmittitur, concessi, aliisque juribus canonicis, civilibus, et municipalibus, consuetudinibus, parliamentorum actis, consuetudinibus, vel statutis, in contrarium quibuscunque, renunciando eisdem, pro nobis et successoribus nostris, in perpetuum. Præterea, damus et concedimus, et pro nobis et successoribus nostris, nunc prout tunc et, e converso, quietclamamus et transferamus, in et ad prædictum Jacobum Morison, et personam vel personas cui vel quibus ipsum de terris, hæreditatibus, et bonis suis, antedictis, disponere contigerit; nec non in et ad propinquiossem agnatum et cognatum; quibus deficientibus, legitimis hæredibus de corpore suo, ei succedere contigerit in eisdem, totum jus et clameum, juris titulum, placitum et quæstionem, quæ et quas nos, vel successores nostri, habemus, vel quovis modo habere vel clamare poterimus, sine aliquo obstaculo."—From these letters of legitimisation, Ramsay contended, That he, as the next agnate to James Morison, had a right to succeed to him. He pleaded, That the *macula natalium*, or stain of bastardy, with all

its consequences, was removed by the letters of legitimation, which are intended to mitigate the hardships and incapacities whereto bastards are subject by the common law. That the law of Scotland, with respect to the legitimation, was the same as the Roman law, and the laws of France and Holland; the royal prerogative being always understood to extend to giving the bastard all rights of a free citizen, except that of inheriting to his father, or collateral relations. That the words of letters of legitimation, whereof great numbers appear in the records for two hundred years past, are almost uniformly the same with the present ones; and give to their agnates on the father's side, and their cognates on the mother's side, a right to inherit from the bastard, in default of issue of his own body. It signifies little whether the sovereign power could restore the blood so entirely as to create relations on the father's side to a bastard; it is enough, that he can do an equivalent act, by giving to the supposed agnates of the bastard a right of inheriting from him. By bestowing this right, the sovereign hurts no third party, as he disposes only of an estate, to which himself would otherwise be in law intitled; in the same manner as if it had actually escheated thro' bastardy or *ultimus hæres*. That a gift of this nature was equally effectual, altho' the benefit it did not take place, in favor of the grantee and his heirs, but at a distant period. That the sovereign could, by law, make an effectual grant of the casualties of superiority not annexed to the crown, as well those arising in his own, as in future time; and could, in the same manner, dispose of the escheat of bastardy, and *ultimus hæres*, which are not part of the annexed property, to take place at a distant period. Answered for Gowdie. That the form of the letters of legitimation had been borrowed from the form used in France; but that form could not receive effect in the law of Scotland. That, for example, they give right to the cognates, or relations upon the mother's side, to succeed to the bastard; yet by the law of Scotland there is no succession on the mother's side; and with this law the sovereign cannot dispense. In the same manner, they empower the bastard to dispose of his real estate, even on deathbed; yet by the law of Scotland he cannot do so, and

with

with this law the sovereign cannot dispense.—The extent to be given to these letters is to be found, not in their form, but in the law-books: *Craig, lib. ii. dieg. 18. paragr. 40. and 13*, gives his opinion in point against the effect of the letters contended for; and *Skene, voce Bastardos*, and *Lord Stair, lib. iii. tit. 3. §. 44* suppose the only effect of those letters is, to give the bastard a power to test.—That, from a vast variety of instances in the records, it appears, that notwithstanding letters of legitimation, as extensive as the present; yet, on the death of such legitimated bastards, without issue, or without settlement of their estates, the sovereign had uniformly seized, or granted them, as fallen to him, *ratione bastardie aut ultimi heredis*, as, by the law of Scotland, bastards could have no agnates inheritable to them; nor could any precedent be shown of a service to a bastard by his supposed agnates, nor any retour of such service upon record; which two things afford the strongest evidence, that such agnates had no claim, either from the general law of legitimation, or the particular words of the grant. That, both by the common law, and by several statutes, the sovereign was restrained from disposing, by anticipation, of estates, which, in a distant event, might be forfeited or escheated; nor could he grant away future and contingent casualties of the crown, in prejudice of his successor. The Lords found, That by the letters of legitimation, the agnates of James Morison, the bastard, were intitled to succeed to James Morison's estate, heritable and moveable. John Gowdie afterwards set forth to the Court, That he had discovered, that the lands of Maison-Dieu were never the estate of James Morison, but had been the estate of his son Samuel Morison; and from thence he contended, That as the present letters of legitimation only provide, that the agnate shall succeed to James Morison, *in terris suis et tenementis quasitis seu querendis*, the agnates cannot take *terras* or *tenementa* that were never in his person, but only in that of his son; and that grants of this nature ought to be strictly interpreted. Answered for Ramsay, The letters of legitimation are in most ample form, and specially provide, that if the bastard shall die without heirs, his father's nearest agnate shall succeed, as if he, the bastard,

bastard, had been born in lawful wedlock; and the king thereby renounces, for himself and his successors, all right that can accrue to them by James Morison's having been a bastard: That grants of this nature, which do not hurt any third party, and where nothing is given away but what would accrue to the crown, ought to be liberally interpreted: That tho' the estate in question had not been established in the person of James Morison; yet as James Morison was legitimated, so far as that his agnates could succeed to him, they were also intitled to take any estate which belonged to his successors.—Further, That by a particular clause in the grant of legitimation, James Morison was made capable “*ad omnimodus actus legitimes, in judicio et extra judicium, exercendi, dignitatibus, hereditariis, bus, terris, &c. gaudendi, sicuti de legitimo thoro procreatus fuisset, legitimum fecimus,*” &c. That by this clause, he was intitled to succeed and take, and to be succeeded to by his descendants; and John Ramsay, his collateral heir, must, of consequence, be intitled to succeed, and take, as heir to Margaret Morison, the lawful descendant of James. The Lords found, That the lands of Maison-Dieu were not the estate of James Morison, but the estate of his descendants; and the agnates of the bastard were not, by the letters of legitimation, intitled to succeed thereto; and therefore preferred Mr Gowdie, the king's donatar. Fac. Col. vol II. p. 139, Ramsay.

BATTERY.

What under- IT was found, That invasion by any stroke, tho' without blood, fell within the act 1594, Cap. 239, and stood a battery? *slaughter, and troubling of parties in pursuit and defence of their actions.* Stair, Gosh. 31. Jan. 1673; Sleich.—During the dependence of a process the pursuer, in a quarrel between him and the defender, upon another head than that process, having thrown a lighted candle at him, by which he received no hurt, yet the Lords considered, That if they should once find such practices not to be included in the meaning of the act of parliament, but only down-right beating, wounding, or invading, insults of this kind would be encouraged, and

and that it was easy to abstract from the depending plea, and forge another quarrel; and that the act was necessary to curb the *præferenda Scotorum ingenia*; and also calling to mind, that in a former case, 13. Nov. 1695, Sir Alexander Falconer of Glenfarquhar against Sir David Carnaigie of Pittarrow. It was found, That Pittarrow's running with his drawn sword at Glenfarquhar, was an invasion in terms of the law, tho' Glenfarquhar was not touched, nor did any prejudice ensue: Therefore they found, That this case, tho' but a slender attempt, fell within the meaning of the act of parliament, and so assilzied the defender. Fount. 6. June 1699, Williamson.—The like; Stair, 13. Feb. 1679, Cruickshank.—In a battery, *pendente lite*, all that was proven for battery, was, that the pursuer, coming to her brother's house, and desiring to stay all night, he refused it, and ordered six or seven armed men to carry her to the miln, where she was detained all night, and centries set upon her at the door, that she might not escape, and she dismissed the next day; the act of parliament about battery, speaking not only of beating, bleeding, wounding, but also of any manner of way whereby the aggressor might be criminally accused; and the detaining a person *in carcere privato*, without the warrant or authority of a judge, being a very high crime, the Lords therefore found, That the detaining her prisoner under centries, fell under the meaning of the act of parliament. Fount. 2. Feb. 1712, Robertson.—A woman, pursuer of a process, having struck the defender on the mouth with the back of her hand, but no blood following, the Lords found, That this was not such a beating and invading, as to fall under the act of parliament, inferring tinsil of the cause. Fount. 18. Jan. 1709, Fea.

THE act to be understood of the first aggressor, and tho' the party invaded, in his defence, found the aggressor, that does not take off the penalty of the act. Stair, 31. Jan. 1673, Sleich.

IN the case between Sinclair of Brabsterdorain and Sinclair of Southdun, the Lords assilzied from a battery, *pendente lite*, some qualifications being condescended on of a premeditated intention in the

The act to be understood of the first aggressor.

Premeditated design to provoke.

complainers,

complainer, to provoke the other to make the alleged assault upon his person. 12. Nov. 1730.

THE Lords found, That the beating of a burges during a process against the town, is not sufficient to infer the penalty of the act of parliament touching battery, during the dependence of a process. Bruce.

19. Jan. 1715, Town of Peebles.—Taking the benefit of a battery, *pendente lite*, is a merely personal privilege; and therefore cannot be founded upon by the cautioner in a suspension, unless he submit, that the principal is *lapsus*, and that he would otherwise totally lose his relief. Fount. ult. Feb. 1695, Johnston.

IN actions where battery has intervened, the Lords decerned the aggressor to lose the whole plea, tho' he had divers interlocutors in his favor, seeing the whole cause had not come to a period by sentence. Falk.

20. Jan. 1683, Maxwell.—Found, That when one party invades another during a dependence, decree is to be pronounced conform to the libel or summons, and not conform to the act of liti-contestation, if it be narrower than the libel. Harc. (Summons) Jan. 1685, Strachan.

The act has place, before whatever court the process be carried on.

THIS act of parliament does equally extend to all judicatories where processes are intended. Gosh. ult. Jan. 1673, Swinton.

*Battery, how-
sopite?*

A SISTER having obtained decree against her brother, for her bond of provision, but the decree not giving her the whole claim, many years annualrents being cut off, and the brother having also appealed to the house of Lords from that sentence, and then the sister insisting upon a battery during the process, which he alledged she could not now recur to having made her election, and prevailed in the action, the Lords, nevertheless, found, That she might still insist in this complaint. Fount. 12. Feb. 1712, Robertson.

BENEFICIUM COMPETENTIÆ.

A FATHER, cannot by our law, defend against his children, upon the maxim, That *tenetur tantum in quantum facere potest.* Gosf. 24. Feb. 1669, Dicks.—
 In our law parents have not *beneficium competentie.* Marc. (Summons) July 1687, Cairns.

BILL of EXCHANGE.

THE Lords found that salt bills, meal bills, or precepts for delivering the like fungibles, are not privileged as bills of *Money the only subject of bills.* exchange for payment of money; yet found them probative, *in re mercatoria,* without writer's name and witnesses, and without the ordinary solemnities required in other writs. Forb. MSS. 16. Dec. 1713, Lesly—The contrary in terms was afterwards found, so that a bill, or precept, for the delivery of fungibles, is not sustained so much as a probative writ. Nov. 1729, Bruce.

AN obligation to pay 10 shillings sterling *per diem,* until the person should be provided with company in the army, conceived in *Nature of a bill.* the form of a bill, found null. Home,

Feb. 1721, Viscount of Garnock.—“ Sir, Against the first of January, pay to me or order, at the clerk's chamber in Mussleburgh, the sum of L. 100, and that as the price of my growing crops of corn and grafs in the town of Mussleburgh, which are instantly sold you at the foresaid price, by your humble servant,” &c. The Lords found this an effectual bill, notwithstanding it was pled, That it could not be considered as a proper bill, not being a simple acceptance of a draught for a sum of money, but really and truly a contract of sale. 6. Dec. 1722, Wilson.—A bill was sustained in the following terms: “ Pay to me or order, the sum of ; and this, with my receipt, shall be a sufficient discharge of all I can ask or claim of you, preceding this date;” tho' it was pled, That the bill was

was null, as containing a general discharge, incongruous to the nature and form of a bill; in respect it was answered, That if the bill was the result of a computation and reckoning, there could be no harm in expressing the cause of granting; and once fixing this point, the very retiring of the bill is a general discharge of course. The rule is, that it cannot vitiate a bill to stipulate what would equally follow, tho' it were not expressed. 21. Feb. 1738, Trotter.

THE Lords found, that a bill granted on deathbed, was not a legal method of constituting a debt or legacy, even as far as to affect moveables, in so far as the bill was gratuitous. 13. Feb. 1724, Hutton.

Gratuitous bill null. — The same; Home, 9. Nov. 1722, Fulton and Clark. Found, in general, that a donation cannot be constituted by a writing in form of a bill. 3. Dec. 1736, Weir.

BILLS are sustained, tho' bearing annual rent from the date, and before the term of payment. *Bearing annual rent or penalty.* Home, Dec. 1727, Henderson. 28. June 1737, Dinwoodie. 13. Dec. 1738, Gibbie. — But bills, bearing annual rent and penalty, are null, because such stipulations belong not to the nature of a bill. *Ibidem.*

In an action of recourse, at the indorsee's instance, against the indorser of a bill of exchange that was null, as bearing annual rent and penalty; the Lords found, That the indorsement being but a relative writ, must stand and fall with the bill, and therefore, that the indorsement, as well as the bill, was null and void, and incapable of sustaining action of recourse. It was argued here, That indorsement is a new bill, upon which footing an indorsement of a bond has been sustained; and therefore, if the indorsement be regular, action ought to be sustained upon it, tho' the bond or bill, to which it refers, be null, and that equally, whether the debtor be insolvent, and cannot pay, or have a legal objection, and will not pay. 3. Dec. 1730, Thoires.

Subscription of the drawer an essential requisite.

A BILL was found null, being neither signed by the alledged drawer, nor of his hand-writing, which decision was not upon the act of parliament against nent blank writs, because the alledged drawer's

drawer's name was in the body of the bill; but, upon its footing, That a bill is a mutual contract, an order or mandate by one party, and an acceptance of the order or mandate, by another, which binds the parties mutually, according to the nature of the mandate: And, upon the common principle of contracts, both parties must be bound, or neither, and so there can be no obligation, unless the consent of the drawer be interpolated, as well as that of the acceptor. 6. Dec. 1738, M'Raith.——In the like case, where the drawer's name was in the body of the bill, but wrote with another hand, an arrestment laid on in the acceptor's hands, before the drawer exhibited his subscription, was found good against an onerous indorsee; for ere the acceptor of the bill was *ab ante* debtor, and ere the debt was fairly attached by the arrestment, it could not be transformed into a bill, to disappoint the effect of the diligence. 14. Feb. 1734, Neilson.

IT is sufficient, if a bill is accepted, tho' not addressed to any person. Home, 9. June 1727, Grierfon. *Good, tho' wanting an address.*

A BILL is indorsable, tho' not bearing to order. Home, Jan. 1726, Richton. *Wanting to order.*

IN a competition between an indorsee and an arrestment, the prior indorsation was preferred, because bills require no intimation. Fount. 13. July 1698, Ewing. *If intimation is requisite?* Arbuthnot draws a precept on Heriot, in favor of Anderfon, to account with him for 190 bolls meal, and 51 stone of iron, and to take his receipt for what he should pay, which Arbuthnot obliges himself to allow to Heriot; the Lords found, A precept of this nature required intimation; and so preferred a creditor of Arbuthnot's, arresting the subject in Heriot's hand, after the date of the precept, but before intimation thereof. Fount. 19. July 1706, Anderson.——In a competition between a donatar of single escheat, and the *porteur* of a bill, drawn by the rebel on his factor in Holland, and protested against him for not-acceptance, which of the two had best right to the rebel's effects in the factor's hands; the Lords found, That the creditor, in the bill drawn on the factor, and protested

tested for not-acceptance, is preferable to the donation of escheat, seeing the drawer of the bill was, by the draught, denuded of the subject for which the bill was drawn, and that the said bill was drawn before denudation, and protested before the gift of escheat was sealed or declar'd. Feb. 1724, Competition between Stewart and Elliot.—A man having drawn a bill upon his debtor, payable to Ker, and thereafter another bill payable to Parkhill, which was first protested for not-acceptance; in a competition between the two bills, with respect to the subject in the debtor's hands; the Lords preferred Parkhill, as having the first protest for not-acceptance: For, tho' a simple indorsation upon the back of a bill, makes a full conveyance, without necessity of intimation, a bill drawn upon a debtor must be intimated. Feb. 1737, Ker.—A bill drawn upon a debtor, payable to a third party, and protested for not-acceptance, is equivalent to an intimate assignation, and preferable to an arrestment laid on thereafter by another creditor. Nov. 1734, Mitchell.

A BILL, drawn payable to a third party, bore the clause, *This with the porteur's receipt*

Effect of an indorsation. *shall oblige me to repay the like sum to you or your order.* The acceptor having paid the bill, indorsed the obligation

for re-payment; and, in a process, at the indorser's instance, against the drawer, it was pled, That the indorsation was a valid transmission, not only because the obligation was contained in a bill, but because all obligations whatever, are transmissible by indorsation; indorsation being truly a bill. The Lords sustained the pursuer's title, in respect that the obligation to repay was ingross'd in the Bill, and that the indorsation implied an assignation. Home, 28. June 1727, Grierson.

IN a reduction, upon the act 1696, of a disposition granted to a creditor, as in prejudice

Acceptance not presumed of the date of the bill. of the pursuer, a prior lawful creditor it was objected, That the pursuer was not a prior lawful creditor, being creditor by bill drawn the same day the disposition was granted, and accepted without a date. Answered, The acceptance must be presumed of the same date.

ate with the bill, being amongst parties living in the same town. The Lords refused to sustain this presumption. Dal. 24. Fount. 25. July 1702, Man.

The Porteur's Action against the Person upon whom the Bill is Drawn.

THE Lords found a person, who suffered a bill, drawn upon him, to be protested for non-acceptance, liable to the possessor in the quantum he had of the drawer's effects at the time of protesting the bill, which was found to put him *in male fide* to pay hereafter to the drawer. Forb. 9. Dec. 1712, Gordon.—Two, in copartnery, having commissioned a factor abroad to send them goods in company, and advised him by their letters, that they would honour his bills for the price; and one of the copartners having, in the ordinary manner, accepted the factor's bills, drawn as *per advice*; and the other, having accepted them for his own part; the Lords found, That the latter ought to have simply accepted the bill, and therefore was liable to the possessor for payment of the whole sum. Dal. Forb. 10. Dec. 1712, Naughton.

The person upon whom the bill is drawn, is bound to accept, if he is possessed of the drawer's effects, or has given orders to draw upon him.

SEPARATE receipts of partial payments of bills of exchange, do not militate against possessors to whom these bills are afterwards indorsed. Forb. 12. Dec. 1711, Erskine. Dal. 24. June 1714, Fairholm.—Compensation upon the indorser's debt, not receivable against the onerous purchaser, which holds in inland bills as well as foreign. Kount, Dal. ult. Jan. 1699, Stewart and Gordon.—The possessor of a bill, to whom it was indorsed for value, was preferred to the indorser's creditor, who had arrested the money in the acceptor's hands before indorsation. Dal. Forb. 5. Dec. 1712, Home.—A debtor having drawn a bill upon his chamberlain, payable to his creditor, and thereafter an arrestment being laid in his hands, for a debt due by the creditor; in a competition between the arrester and an onerous

Extraordinary privileges of bills.

nerous indorsee to the bill, the indorsation being blank, was presum'd of the same date with the bill, in order to prefer the indorsee. Forb. 15. July 1709, Colvil. See Dal. 9. July 1714, Mitchel.—A defence laid against a bill, that it was elicited by the drawer, after he had intoxicated the acceptor with liquor, when the other was insensible, and incapable of knowing what he was doing, and without any onerous cause, was not found good against an onerous indorsee; tho' it was pled, That force and fear, and such like real exceptions, are sustained against onerous indorsees; it being answered, That drunkenness is but a temporary incapacity, which ought not to be regarded, especially seeing it was the acceptor's own fault. 24. Feb. 1736, Wilson and Fraser.—A charge upon a bill for L. 40 Sterl. at the instance of an onerous indorsee, being suspended, upon this ground, That it was granted for money won at play; the Lord repelled the reason of suspension founded upon the game act, in respect the bill was purchased by the charger for onerous causes, and that no evidence was offered of his being in the knowledge that the bill was granted for a game debt. 26. Jan. 1740, Neilson.—But between the drawer and acceptor themselves, where onerous purchasers are not concerned, all objections and alledgeances are relevant, *hinc inde*, as in other contracts. Fount. 13. Feb. 1706, Plumer. Forb. 5. June 1707, Boyes. Dal. 17. June 1714, Arbuthnot.

A BILL being indorsed, not for value given at the time, but in security of debt, was found

*Bills having
no extraordinary
privileges.*

excluded by an anterior discharge, granted by the drawer to the acceptor. Forb. Fount. 15. Jan. 1708, Crawford.—a bill, drawn payable to a third party, bore this clause, *This, with the porteur's receipt, shall oblige me to pay the like sum to you or your order.* The acceptor having paid the bill, indorsed the obligation for repayment; and, in a process, at the indorsee's instance, against the drawer, this defence was proposed, That the obligation to repay was of the nature of an ordinary obligation, no bill of exchange, and tho' indorsible, a privilege competent to any simple obligation, it was liable to compensation upon the debt of the cedent. The Lords repelled the defence. Feb. 1728, Grierison.

THE

BILL OF EXCHANGE. 161

THE acceptor of a bill of exchange, dying soon after acceptance, before any *mora* was incurred; in such a case exchange, or re-exchange, cannot be due, there being no voluntary failzie or fault. *Stair, July 1664, Kennedy.*

Acceptor how liable, if in mora of making payment?

Acceptor's Recourse against the Drawer.

AN acceptor having paid a bill drawn upon him, and payable to a third party, without bearing *value in his own hands*; the Lords followed his heir action of recourse for reimbursement. *Forb. 4. July 1711, Cunningham.* — The like, *Forb. 10. July 1712; Wilson.*

Value not presumed to be in the acceptor's hands, unless expressed.

THE porteur of a bill of exchange having indorsed the same before acceptance, and the indorsee having protested for non-acceptance, it was accepted by a third party, upon advice from the drawer; but the acceptance was in these terms, *Accepts for the honour of the drawer and indorser.* In a process of

Acceptance by a third party upon whom the bill was not drawn.

recourse against the indorser, the drawer being bankrupt, it was objected; That for ought appears, the quality might have been added to the protest after the drawer was broke; and that there is no means to prevent such fraud, otherwise than by taking a document at the time of acceptance, and likewise at the time of payment, that the acceptance is in these terms. The Lords found; That a protestation was necessary at the acceptance and payment of a bill, accepted and paid by a third party for the honour of the drawer and indorser, expressing the quality of the acceptance; and therefore sustained the defence, and assolizied. *Dalr. Fount. 15. Dec. 1703, Carstairs.*

Possessor's Recourse against the Drawer.

VALUE is presumed to have been given to the drawer,

er, by the party in whose favor it is drawn, tho' it bears not value received. Forb. 19. March

Value presumed given to the drawer, by the person in whose favor the bill is drawn.

1707, Scot. Bruce, 22. July 1711, Ker.—The same holds with regard to an indorsee, who, upon getting the bill indorsed to him, is presumed to have given value for the same. Bruce, 11. Feb. 1715, Auchinleck.—The like, with regard to the possessor of an order, bearing, "To deliver to him a certain sum, and take his receipt." Forb. 26. Jan. 1709, Swinton.—The Earl of Forfar, July 1715, drew a precept upon the agent of his regiment, of this tenor: "Pay to Agnew, or order, the sum of L. 111 Sterling, out of the first subsistence you receive for me, which shall become due eight months after date." In a process of recourse, it was found, That this precept, tho' it did not bear, yet presumed value. June 1731, M'Dowal.

Unless drawn payable to a creditor.

A BILL, drawn payable to a creditor, not bearing value received of him, understood to be in satisfaction *pro tanto* of the debt, and not presumed that the creditor gave present value for it. Forb. 18. July 1712, Cheap.

A PRECEPT, for victual upon tenants, with a receipt conform, found obligatory against

The presumption has not place in precepts for victual, &c.

the person upon whom it was drawn, for payment of the price, tho' not demanded for 16 years thereafter: for it was presumed, that value was not given when the precept was granted, it bearing no such thing. Gosf. 9. Feb. 1672, Merchiston.

THE possessor of a bill, protested for not-acceptance, was denied recourse, not having time-

Bills must be negotiated.

ously acquainted the drawer of the same, and the designed acceptor broker in the *interim* with the drawer's effects. Forb. 10, 21, and 28. Feb. 1710, Miln.—*A fortiori*, he was denied recourse, who had not so much as protested for not-payment, nor done any diligence against the person drawn upon, till he became insolvent. Forb. 10. July 1706, Brand.—In an action of recourse against the

The drawer of an inland bill, recourse was denied to the creditor, thro' his want of duly negotiating his bill, being found, that porteurs of inland bills, are subjected to the same necessity of rigorous negotiation, that porteurs of foreign bills are. 9. Jan. 1731, M'Kenzie. — Recourse is still competent upon a bill, tho' not duly negotiated, if the drawer cannot show, that he had effects in the acceptor's hands; for, in that case, *nihil illi deest*. Feb, 1731, M'Kenzie. — Or, if the person upon whom the bill is drawn continue responsible. Forb. 8. June 1706, Swinton.

PRECEPTS upon chamberlains, or others, granted to creditors, bind them not to the formalities of presenting, protesting and intimating, necessary in formal bills, and in exchange and trade between merchant and merchant. Dir. 27. July 1666, Newburgh. — The contrary afterwards found; Forb. 20. Dec. 1711, Leven.

If the same hold in precepts granted to creditors?

A BILL was regularly protested for not-acceptance, at the term of payment, and the same intimated to the drawer. The day after, the person upon whom it was drawn, accepted the bill payable at the distance of 14 days; and, after elapsing of that time, a second protest was taken for not-payment. In an action of recourse it was held, That this indulgence of 14 days to the debtor, must turn the risque on the pursuer, and bar recourse; because, by that delay, the drawer's hands were tied up from using measures to recover his debt. The drawer, notwithstanding, was found liable. Forb. 4. Nov. 1705, Brown. But this case was with relation to an inland bill, the rules of negotiating which were not then well ascertained, and the bill was for a small sum. — Found relevant to infer recourse against the drawer, that the bill was timeously protested, for not-payment, against the acceptor, and the protesting intimated to the drawer, tho', thereafter, the porteur took assignation to an investment of annualrent, in security of the debt contained in the bill, which was a trans-
action.

What understood sufficient negotiation.

action for the common benefit of both drawer and porteur, and could not therefore bar the action of recourse, once established by the due negotiation of the bill. Forb. 7. Fount. 8. Feb. 1711, Nicolson.—In a process of recourse, it was objected, That the pursuer had failed in the negotiation, having neglected to present the bill for acceptance, a long while after it was delivered to him. Answered, The bill, being drawn payable upon a certain day, was regularly presented for acceptance upon its falling due, and a protest taken for non-payment. The defence was repelled, and no necessity found to present the bill before the day of payment. Home, 16. Feb. 1727, Ferguson.—A bill, payable at sight, or days after sight, requires not the same rigorous negotiation with bills payable at a certain day: such a bill is designed for the benefit of the holder, that he may call for the money as his exigences require, and so a discretionary power is understood given him to present the bill, sooner or later. On this account, recourse was sustained on a bill payable fourteen days after sight, tho', had it been presented for acceptance, by the course of post, it might have been exigible four days before the acceptor broke and went off; whereas, by the holder's delay, it became not due till after the bankruptcy. 7. Feb. 1735, Gordon.—But, on a reclaiming petition, the matter was transacted.

ONE at Edinburgh bought a bill upon London, payable to his correspondent at Bristol, who accidentally happened, at that time, to be abroad upon a voyage; and, before his return, the London merchant broke, and so it happened, that the bill was not negotiated: yet recourse was sustained against the drawer, seeing here the porteur was guilty of no fault or negligence. Stair, 1. July, Dir. June 1676, Wallace.—'Tis sufficient to bar recourse upon a bill, that the non-payment, or non-acceptance, was not duly notified to the drawer; and the allegiance was not found relevant, that he heard of the same from third parties, seeing he was to rely upon a notification from the porteur himself, or by his order.

Feb. 1731, M'Kenzie.

IN a process of recourse, it being objected, That the pursuer had failed in diligence, in so far as he had given the debtor a long day to make payment; Answered, *Non relevat*, unless it be instructed, that in the interim, the acceptor broke with the drawer's effects in his hands. Replied, Porteurs are bound to strict diligence, and the least failure turns the hazard entirely upon them. It is sufficient therefore to say, that if the acceptor had not made a delay, the drawer might possibly have recovered his money. The proof, in such a case, would be difficult, if not inextricable; and it would be unreasonable to lay him under this burden, where the fault was the porteur's. The Lords ass-
 foilized from recourse. 18. Dec. 1729, Flower.—The like, where the porteur had failed to intimate to the drawer the dishonour of the bill; *Ibid.* 12. July 1729, Ferguson.

Effect of neglecting to negotiate.

Bills, by the Lapse of Time, lose their Privilege.

A BILL being suffered to lie over, without any diligence thereon for payment, during five years, the Lords found, That the indorsee was only to be considered as a common assignee, liable to the exceptions competent against his cedent. Dal. Bruce, 18. Feb. 1715, Murray.—The like; Dal. Bruce, 19. Feb. 1715, Douglas.—An inland bill having lien over three years, without protest or other diligence upon it, compensation, upon the debt of the indorser, was found competent against the indorsee for an onerous cause, in respect it was not judged for the benefit of commerce, that bills not protested in three years should be better than bonds; or that bills, which can easily be forged, should stand out as lasting securities. 6. Feb. 1719, Farquharson.—But, in a parallel case, compensation was not sustained where the bill had lien over but two years and eleven months. Feb. 1728, Grierson.—A bill having lien over be-
 tween

Bills, by the lapse of time, lose their extraordinary privileges, and come to be of the nature of any common obligation.

tween five and six years from the term of payment, without diligence, and thereafter indorsed, it was found to have lost the privileges of a bill of exchange, and that the indorsation imported only the warrandice of an assignation; and therefore, that recourse was not competent thereon. Jan. 1729, Hodge.

THE Lords sustained action upon a bill of exchange, tho' it had lien over near 20 years; but here the pursuit was against the acceptor himself, acknowledging his subscription, and offering no objection against the bill, except the length of time it had lien over. June 1729, Hedderwick.—In a process of recourse, at the instance of an executor,

If they lose their ordinary privileges, and cease to be probative by a longer lapse of time?

who, after the bill had lien over 23 years in the defunct's custody, protested the same for non-acceptance, the drawer had nothing to say for want of due negotiation, because the designed acceptor was solvent; but he pled, That the bill was null upon the act 1681, as wanting writer's name and witnesses. He allowed, that bills are excepted out of this act by custom, for the benefit of commerce, and by analogy to the laws of trading nations; but then the exception ought not to be absolute; it ought to be no broader than the practice of other nations will support it, from whence the exception is copied; and there is no trading nation in Europe, where there is not a limitation upon the currency of bills, in some five years, in some six, in others seven, but no one goes the length of twenty. The defence was repelled. 5. July 1734, Relict of George Swan.

A BILL is good, tho' directed to one as principal, and to others as cautioners. Home, p. 324. Hill, &c. 17. June 1740.—And, action lies against one who accepts specifically as cautioner. Fac. Col. vol. I. p. 139, Gibson, 11. Nov. 1753.

A BILL, bearing annual rent from the date to the term of payment, was found good. Home, p. 380. Shaw, 10. June 1743.—The like; Home, p. 419. Laidler, 10. June 1744. The contrary was found. Fac. Col. vol. II. p. 94. Douglas, &c. 15. Nov. 1757.

BESIDES the objection to the bill, upon which the decision

decision, in the case Lauder above noticed, proceeded, there was an objection to another bill, that it bore interest from the date, untill paid. The Lords repelled the objection, in respect the defender acknowledged the debt to be just. Home, p. 419. Lauder, 10. June 1744. See Rem. Dec. p. 74. 9 Dec. 1743, Drummond.

A BILL, bearing annualrent and penalty, was sustained; annualrent having been paid several years, and the debt not denied. Fac, Col, vol. II. p. 369. M'Lachlan, Jan. 1760.

ROBERT TAYLOR writer in Hawick, having use for L. 29 Sterling, which he knew his aunt Jean Taylor had in ready money, and chusing to hide the borrowing from her to whom he gave himself the airs of being a moneyed man, prevailed upon Robert Tudhope to act the part of the borrower. Robert Tudhope accordingly got the money, and granted his bill, dated 29. March 1743, and payable the 29. of March 1744, which Jean Taylor delivered to Robert Taylor, who was her ordinary doer, to be kept for her use with her other papers. The moment she was gone, Robert Tudhope delivered the L. 29 to Robert Taylor, and took his bill for it, of even date with the other bill, and payable at the same term.—Sometime thereafter, Robert Taylor, pressed by Thomas Turnbull merchant in Hawick, for payment of an accompt of L. 17 Sterling, could find no other fund for satisfying the creditor but his aunt's bill, which remaining blank in the drawer's name, he filled up his own name as drawer, and indorsed the same to Turnbull. Diligence upon this bill against Robert Tudhope, obliged him to bring a suspension before the Court of Session, founding upon the counter-bill granted to him by Taylor, as a ground of compensation, which, in this case, he insisted ought to be good against the indorsee as well as the indorser. And, *in limine*, the following fact was ascertained by the charger's acknowledgment, that the bill was indorsed to him for payment of an accompt of L. 17 Sterling, due to him by Taylor, made up partly of lent money, and partly of goods furnished; and that he was to account to Taylor for the surplus of the bill when received. The Lord Ordinary having repelled the ground of compensation, and found the letters orderly proceeded

ed for L. 17, to which extent the indorstation was for a valuable consideration, the suspender submitted the following reasons to the court, premising. That a distinction ought to be made between a bill *in re mercatoria*, where three person's are concerned, and a bill between two persons. The former, by saving the carriage of money from place to place, had great respect paid to it, and was intitled to extraordinary privileges. The latter, a more dangerous security than a bond, and answering no end of commerce that a bond did not answer, was intitled to no peculiar privilege more than a bond; and, if compensation be good against an onerous assignee, it ought to be equally good against the indorsee of such a bill. A bill of exchange, payable to a third party, was considered in law as a bag of money, which passed freely from hand to hand, without any impediment. Thus it was established in practice, that compensation upon the debt of the indorser, did not meet the onerous indorsee to a bill of exchange. No statute, nor no decision had said, that a bill, between two persons, which could have no other effect than to be a security for debt, was endowed with the same privileges. So late as the year 1714, it was doubted in the Court of Session, whether inland bills of exchange were intitled to the extraordinary privilege of barring compensation; and it was resolved in the affirmative, upon the report of trading merchants, who all testified that it was the constant practice. This happened in the case of Fairholm, 24th June 1714. At that time there could not be the least idea that a security for money, in the form of a bill, was intitled to the same extraordinary privileges. The Lords, at advising, gave very different opinions upon this case. Arncliffe declared strongly for the distinction between a bill of exchange, and a bill, chosen in place of a bond, to vouch a debt between two persons. Tinwald thought, that a bill, containing a distant term of payment, was scarce intitled to any privilege. Elchies was of opinion, that where a bill of exchange was indorsed for security of debt, the indorsee was not intitled to any privilege. But he observed, that the bill in the present case was indorsed for payment of the L. 17 Sterling, which was strictly an onerous cause, and the same as if the indor-

See had paid the L. 17 in ready money for the indorfa-
tion. But the result was, to adhere to the Lord Or-
dinary's interlocutor, repelling the ground of compen-
sation. Remark. Dec. p. 162. Tudhope, 22. June 1748.

A BILL, conveyed in security or payment of a debt
due to the indorsee, was found not to be affected by
the indorsee's back-bond. Fac. Col. vol. II. p. 13.
Douglas, 7. Jan. 1757. But this back-bond was found
good against the other creditors of the indorsee, for
whose behoof the bill was conveyed in trust to the in-
dorsee, *Ibid.*

A BILL, indorsed, which had lain over for *twenty*
months after the term of payment, without any dili-
gence done upon it, was found subject to compensation.
Fac. Col. vol. III. p. 174, Scougal, Feb. 1762.

A HUSBAND, when on deathbed, delivered two
bills, indorsed blank, to his wife, saying, She would be
content now; the Lords found, That this was an absolute
donation, and that the bills was properly conveyed to his
wife. Fac. Col. vol. I. p. 93. Barbour, &c. 8. Feb. 1753.

—The objection that a bill was granted on deathbed,
without value, in order to constitute a legacy, and that
it was not subscribed by the drawer till after the accep-
ter's death, is not relevant against an onerous assignee,
Fac. Col. vol. III. p. 149. Shaw, 24. Nov. 1761.

A BILL of exchange must be protested for not ac-
ceptance, on or before the day of payment, otherwise
recourse is lost. Remark. Dec. p. 70. Home, p. 386.

July 1743, Ramsay.—The like, altho' porteur con-
tended, that the intended acceptor had not value of
the drawer's in his hands; that he would not have ac-
cepted the bill, even if it had been duly presented; and
that the indorser did not suffer any prejudice from the
undue negotiation. Fac. Col. vol. I. p. 227. Hart, 21.

June 1755.—Recourse was refused on a bill protested
on the day after the last day of grace, tho' no damage
arose from the delay. Fac. Col. vol. II. p. 228. Tod, 12.

July 1758.—The porteurs of bills at sight, have a dis-
cretionary power, as to the time of presenting. Fac.
Col. vol. II. p. 355. Andrew, 21. Nov. 1759.—If the
dishonour of a bill is not duly notified, recourse is not
competent, altho' the bill be timeously protested for
non-payment, and altho' the person drawn upon has no

effects of the drawer's in his hands, Fac. Col. vol. III. p. 86. Fairholms, &c. 23. June 1761.—Recourse was found competent on a protest duly notified, tho' the bill and protest were not returned till 39 days after the dishonour. Fac. Col. vol. II. p. 50. Hawkins, &c. 25. June 1757.—The like, with regard to a promissory note. Fac. Col. vol. II. p. 488. Coats, &c. 18. Dec. 1760.—A bill, indorsed in security, does not require negotiation. Fac. Col. vol. II. p. 145. Alexander, 9. Jan. 1758.

THE drawer's name may be filled up in a bill, kept in his own custody, at any time before it is produced in judgment. Fac. Col. vol. II. p. 241. Ferguson, 31. July 1758.

IT is sufficient to support bills, signed by initials, that the party acknowledges they were truly adhibited. Fac. Col. vol. II. p. 498. Shepherd, 19. Nov. 1760.

ACTION was refused on a bill which had lain over 30 years. Fac. Col. vol. I. p. 147. Lookup, 30. Feb. 1754. The like; Fac. Col. vol. II. p. 281. Wallace, &c. 9. Jan. 1759; and, on a bill which had lain over 27 years. Fac. Col. vol. II. p. 425. Stewart, 15. July 1760.

ACTION was sustained on a bill after the elapse of 21 years, the acceptor being alive, and the subscription not denied. Fac. Col. vol. II. p. 110. Hamilton, 10. Dec. 1757.—The like, as to a bill that had lain over some months less than 20 years from the term of payment. Fac. Col. vol. II. p. 314. Fraser, 22. Feb. 1759.—The like, where a bill had lain over 19 years, the drawer making oath that the contents were still resting. Fac. Col. vol. II. p. 448. Pringle, 18. Nov. 1760.

BY the late statute, 120. Geo. III. cap. 72. for rendering the payment of the creditors of insolvent debtors more equal and expeditious, &c. Promissory notes are put on a footing with bills, as to diligence, interest, indorsation and the privileges of indorsees.—And it is provided, That bills, and promissory notes, shall not be effectual to produce diligence or action after six years from the term of payment; the six years to run from the 15. May 1772, as to bills or notes of a date prior to that day; it being still competent to prove, that the debts are resting and owing, by the oath or writ of the debtor. Bank-notes, or post-bills are excepted; nor are the years of the creditors minority to be computed.

puted — Inland bills and promissory notes must be protested within the days of grace to preserve recourse ; but it is sufficient if the dishonour is notified within 14 days after the protest ; without prejudice to the notification of the dishonour of foreign bills, within such time as is required by usage. — Summary execution by horning, or other diligence, shall pass on bills, whether foreign or inland, and whether accepted or protested for non-acceptance, and on promissory notes duly negotiated, not only against the accepters or granters, but likewise against the drawer and all indorsees jointly and severally, except the indorsement be qualified to be without recourse. — Summary execution shall be competent to an indorsee, tho' the protest has not been taken in his name, and tho' the bill be not reconveyed to him by indorsement, if he produce a receipt for the value by act of honour, or a missive letter from the protesting indorsee, mentioning the dishonour. — The act to be in force only for seven years from the 15. May 1772, and to the end of the then next session of parliament.

BILLS bear annualrent. See Annualrent.

BILLS fall under the act of bankruptcy. See Bankrupt.

BLANK bill. See Blank writ.

AS to co-accepters and co-creditors. See Solidum & pro rata.

BILL probative of its date. See Proof.

BILL granted on deathbed proves not its onerous cause. See Proof.

INDORSEE's private knowledge of exceptions. See Bona & mala fides.

BLANK WRIT.

GRANTING a blank bond, implies a renunciation of all exceptions competent at the time ; and therefore, it was found, That compensation could not be objected against a possessor of a blank bond, upon the debt of the original creditor. Granting a blank bond implies a renunciation of all exceptions competent at the time. Stair, 27. Feb. 1668, Henderson. — In like manner, a bond granted for the price of land, blank in the cre-

ditor's name, out of the hand of the original creditor; was found effectual; and that the granter could not stop payment, upon an alledgeance, that incumbrances were not purged. Stair, Gosf. 19. Dec. 1676, Grant.

But not of exceptions afterwards emerging.

Blank bond requires intimation; and all exceptions emerging, between the date of the bond and intimation, will operate against the assignee.

before the arrestment. Newb. Stair, Gilm. 11. Nov. 1665, Telfer.—Again; Stair, 1. Dec. 1665, *inter cedem*.—The like; Stair, 18. Jan. 1668. Brown. Fount. 11. Feb 1697; Campbell.—See also Dur. 9. Feb. 1657, Crawford.

IF a blank bond is lying by the creditor at his death,

Blank writ lying by creditor at his death.

no person has a right to fill up his name therein; but it must be confirmed as *in bonis defuncti*. Stair, 3. June 1680, Buchanan. Gosf. 3. Feb. 1679, Kinghorn.—In a reduction at the instance of the nearest of kin, of a disposition *universum bonorum*, in favor of a stranger, the reason insisted on was, That the disposition had been signed blank, and probably taken out of the defunct's pocket after his decease, by the lady in whose house he died, and the blank filled up with the name of one of her sons. The Lords, before answer, having allowed a conjunct probation, it came out, That the disposition was not filled up till after the granter's death, and therefore they reduced the same; and tho' the lady deponed she had his order for doing it, yet that being a mandate, *perit mori manda-*

THE granting of a blank bond, found to be a passing from all grounds of compensation, competent to the debtor before the granting of the bond; but not for those emerging thereafter. Harc. (*Compensation*) Jan. 1687, Grant.

BLANK bond requires intimation, and all exceptions emerging between the date of the bond and intimation, good against the cedent, will be sustained against the assignee: Thus compensation was sustained. Harc. (*Compensation*) March 1684. M'Culloch.—The like; June 1733, Baillie.—An arrester was preferred to a party whose name was filled up in a blank bond; seeing the filling up was not intimated to the debtor,

mandatoris; yea, tho' he had filled it up after his sickness, it was still reducible, *ex capite lecti*. Fount. 29. Dec. 1697, M'Kenzie.

Decisions upon the act 25. Parl. 1696.

THE Lords sustained a blank bond, tho' it was not delivered till after the 25. act parl. 1696; because it was subscribed before the said statute. Forb. 15. March 1707, Leven.

THIS act extended to a disposition of tailzie, blank only in the substitution, so as to annul that substitution, tho' afterwards filled up according to the direction of the tailzier. Home, 13. July 1722, Competition Kennedy of Culzean with Arbuthnot.

A BILL being drawn blank in the creditor's name, the Lords found, That such bills fall within the compass of the said act; and that the bill was null, the exception in the act being only concerning indorsements. Fount. 3. Forb. 9. Feb. 1711, Brand.—A bill, taken payable to the bearer, found null upon this act 8. Jan. 1730, Executors of Major Robert Walkinshaw.

IN the reduction of a bill, upon the act 1696, as being blank in the drawer's name when accepted; and the same being referred to the creditor's oath, he deponed, That the bill was left blank in his hands, as a fund of credit, for procuring the loan of the sum therein mentioned; that within two days he himself made up the sum, delivered it to the acceptor, and thereupon subscribed his own name as drawer. The act statutes, That the creditor's name be inserted before delivery; and some of the Lords were of opinion, That by this was meant the delivery of the deed itself, which would make the bill, in this case, null; but it carried to sustain the bill, because, in the eye of law, it was not considered as a delivered evident, until the money was advanced, at which time, and no sooner, did it commence to be a *jus crediti*. 27. July 1738, Henderson.

BONA et MALA FIDES.

Bona fides non prodest adquirere volentibus.

THE cautioner for one Sumner, factor in Flanders, being pursued for goods sent him from Eymout, seven days after he was deposed by the convention of burrows at Glasgow, it was pled for the defender, That he was free from the very day the factor was discharged from his office. Answered, The lieges were, in *bona fide*, to correspond with the factor till his discharge was intimate, and the goods purchased for were shipped before the commissioner's return from the convention. Applied, That as he was named a factor, without public intimation, there was no necessity to intimate his deposition, at least, the cautioner is not to be burdened with the intimation. The Lords assolvizied the cautioner. *Harc. (Cautioners)* March 1682, Trotter.

PRIVATE knowledge of a prior assignation, was so far found sufficient certification, as to put another in *mala fide* who obtained a second. Col. June 1582, Stirling.—A public infestment being given to a man and his wife in conjunction,

and a *medium impedimentum* intervening before confirmation, *viz.* a base infestment to a third party, yet the Lords drew back the confirmation, to the date of the infestment confirmed, in respect the base infestor had acknowledged the conjunct-har's right, in taking the disponent obliged to procure her consent to his right. *Spot. (Conjunct-fee)* 15. Feb. Dur. 4. Feb. 1629; Home.—The like; Dur. 15. Feb. 1637, Lauder.—A wadsetter having disposed a subject to his daughter, and the heirs of her body; which failing, to certain substitutes named, with a prohibitory clause, that the daughter should do nothing to prejudice the heirs of tailzie; and the daughter making up her titles to the subject, as heir of line, neglecting the entail, and disposing the same to her husband in her contract of marriage; the husband, uplifting the wadset sum, was found liable to refund the same to the substitutes, there being no heirs of the marriage: for, tho' an onerous purchaser of the wadset, not knowing

knowing of the disposition of tailzie before his purchase, would have been secure, yet the husband having, beside the wadset, got a plentiful tocher, and having known of the disposition of tailzie, which he had in his keeping, before uplifting the wadset sum, this was found to put him in *mala fide*. Stair, 25. July 1661, Wemyss.

THE possessor of a bill having raised a process for recourse against the drawer, and thereafter indorsed the bill, in a new process for recourse at the indorsee's instance, his knowledge of the former process, which rendered the bill litigious, found relevant to subject him to the oath of the indorser. Forb. 29. Jan. 1708, Pitson.—In a competition

Indorser's private knowledge of exceptions, competent against the indorser of a bill.

between an arrester of a bill of exchange and an onerous indorsee, who, at the time the indorsation was taken, knew the arrestment was laid on, and saw that the bill was not signed by the drawer, tho' he was named in the body of the bill, but got him then to add his subscription; the Lords found it relevant to prefer the arrester, that it consisted with the indorsee's knowledge, that the arrestment was laid on before signing the bill by the drawer. June 1728, Competition between Logan and McCoull.

THE managers of the manufactures in Edinburgh, having required a Bailie's concurrence at nine o'clock at night, in winter, for searching for prohibited goods, hid in two houses that were private ones, and, upon his delay, taking instruments, and giving in a complaint to the Lords, founded upon the 5th and 12th acts of parliament 1706; the Lords found, That in this circumstantiate case the bailie had not obeyed the act of parliament; for they thought that magistrates might be required to give their concurrence at any time, whether by day or by night, except from ten at night to five in the morning; and found, that the informers were not bound to describe the houses, inhabitants, or masters, where they craved the search to be made; but the bailie was, nevertheless, absolved from the fine, because of his *probabilis ignorantia juris*. Pount. 30. Nov. 1703, Fairholm. The Lords found it unwarrantable in a messenger

Ignorantia juris.

senger to commit one to prison, by virtue of a caption for debt, after intimation of a list, upon a bill of suspension obtained by the prisoner, altho' he was in the messenger's hands before the list was intimated or procured; but the messenger, in respect of his *probabilis ignorantia juris*, was not found liable to pay any expenses to the prisoner on account of his incarceration. Forb. 27. July 1710, Lamb.—Magistrates were found liable in a subsidiary action for the debt, having refused to receive the debtor into their prison, tho' required by a messenger, in virtue of a caption. And it was found no sufficient excuse, that an attested double of an expedite suspension was intimated to them in behalf of the debtor, for they ought to have regarded nothing but the original suspension itself. Forb. 3. Dec. 1709, McKenzie.—It does not save from recognition, that the vessel disposed thro' ignorance of the law, and not by contempt or ingratitude. Stair, 5. Feb. 1663, Carnegie.—A relict, having confirmed a bond, bearing annual rent, and uplifted her third of it, which she had no right to do, the heir's tutors were found liable for the same, *negligentiam*, in not pursuing for repetition, and *ignorantia juris* was not sustained as a defence for them. Goss. 19. Jan. 1670, Balfour.

Command of a
superior, how
far it infers bona
fides.

IN a subsidiary action against a Gossler's relict (as representing him) for his suffering a prisoner to escape, the Lords absolved the relict, because he behoved her husband to obey the magistrates. Fount 15. Nov. 1679, Williamson.—Found, That tho' a wife was accessary to a spulzie committed by her husband, yet after his decease she cannot be pursued for the same. Bal. (*Husband*) 9. Nov. 1565, Crichton. Mait. 27. Nov. 1565, Bryson.—As also found, That altho' a decree of spulzie and ejection was obtained against a husband and his wife, as joint actors, yet that it could receive no execution against the wife or her executors. Bal. (*Husband*) 29. March. 1568, Wardlaw.

A TENANT, having a faculty by his tack to retain his rent for interest due to him, and the estate having afterwards been sequestrated, at the instance of real creditors,

ditto,

itors, he was found *in bona fide*, to impute the rent to his interest, until he was interpellated by citation. Falc. vol. I. p. 325. M'Tavish, 11. Feb. 1748.

A PURCHASER of a house, entering to possess on his disposition, and continuing, after it was sequestered, at the instance of the disponent's creditors, he not having been interpellated by the factor, was found *in bona fide*, and not accountable, tho' the subject was evicted by prior rights. Falc. vol. I. p. 17. Creditors of Buchanan, 7. Dec. 1744.

A PERSON entering to possess a subject on a title of property, and being afterwards found accountable, was found not liable to account by a rental. Falc. vol. I. p. 148. Dick, 15. June 1748.

A BARON, holding *cum piscationibus*, having fished in a place to which he had no right, was found to have been *bona fide* possessor. Falc. vol. II. p. 174. Perth, 28. July 1750.

A GRANT of lands, *cum decimis inclusis*, bearing a separate reddendo for stock and teind, and under the burden of a payment to the minister of a parish, within which they once lay, tho' now disjoined, was found to give no *bona fide* possession of the teinds against the minister suing for arrears of stipends, there having been suits against a former heritor, wherein this heritor was employed as lawyer, who also had the teinds disposed of him, with warrandice from fact and deed. Falc. vol. II. p. 260. Beg. 3. July 1751.

THE lands and estate of Kersland, with the teinds, parsonage and vicarage thereof, were brought to a judicial sale, before the Lords, at the instance of a creditor upon the estate, by an adjudication, which adjudged both lands and teinds; and William Blair of that ilk, was called as a defender in the process; and, in the year 1738, William Scott of Bavidaw, became purchaser of the lands and teinds, as exposed to sale before their Lordships. Capt. Hamilton Blair of Blair, as patron and titular of the teinds of the parish of Dalry, within which the lands of Kersland lie, brought an action against Laurence Scott, son and heir of William Scott, the purchaser of Kersland, for payment of the bygone teinds of these lands, since the time of the purchase. Andry objections were moved to the pursuer's title, which

which being over-ruled, it was pled for the defender That the title under which the sale proceeded, contained the teinds, parsonage and vicarage, of the whole lands, and the decree of sale adjudges and disposes to the purchaser, the lands, with the teinds, parsonage and vicarage; and therefore, had he continued to possess the teinds, under this title, for forty years, he would have acquired an absolute right to the teinds by positive prescription: and, as the defender has possessed the teinds for 12 years, before the date of this action, he is intitled to plead, that he is a *bona fide* possessor, and that they are *fructus bona fide percepti et consumpti*, more especially, that the pursuer's predecessor was misled in the process of sale, and, during a dependence of 11 years, made no claim to the teinds, but allowed them to be uplifted with the stock, and applied for payment of the creditors. Answered for the pursuer, it is impossible to plead a *bona fides* without a title, far contrary to the express tenor of the title. In this case the teinds could not be sold, because there was no such title to the teinds in the person of the common debtor, and the creditors only insisted, that the usual value should be put upon the heritor's privilege of purchasing his own teinds, as appears from the first article of roup. And that William Scott, the purchaser, well understood that the teinds did not fall under his purchase, appears from a petition, given in by him to the court, relative to the purchase; and as to the adjudication upon which the sale proceeded, wherein the teinds are comprehended, it is only conveyed to Bavi law for security of his purchase, which was not of the teinds, but only of the privilege of buying the teinds, and so far he has right in the adjudication, and no further: The decree of sale is his cardinal title, and beyond it he cannot plead a *bona fide* possession. Replied for the defender, The article of roup, referred to by the pursuer, proves that the creditors had not recovered a sufficient title to the teinds in the common debtor, and that they did not chuse to risk an abatement of the price, which might be demanded by the purchaser, upon this account; but, if such title had been found after the sale, this precaution of the creditors would have been no objection to the purchaser's claiming the heritable right of the teinds.

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er would there have been any objections to the purchaser's acquiring a right by prescription, and therefore, till a better right was produced, he was *bona fide* possessor of the teinds, as well as of the lands; and, if in any case, a *bona fide* possession is pleadable, it is in the case of teinds: for, if the titular had made his claim, the heritor could have redeemed himself by payment of ten or nine years purchase, whereas, by secreting his right, as in the present case, he subjects the heritor to twenty years purchase of his teinds, so that the titular's delay ought to prejudice himself and not the possessor. The Lords repelled the defence of *bona fides*, in respect of the answers. Fac. Col. vol. I. p. 55. Blair, 24. Nov. 1752.

PAYMENT by the debtors administrator in law to a person erroneously served heir to the creditor, was not sustained against the true heir, the same not appearing to have been made *bona fide*. Fac. Col. vol. II. p. 33. Howes, &c. 2. Dec. 1758.

THE true proprietor, who possessed as tenant under a *bona fide* possessor, was found liable to account to him for the rents in his hands. Fac. Col. vol. II. p. 443. Conny, 30. July 1760.

BONA fides et probabilis ignorantia, pled as an exception to a spulzie. See Spulzie.

PRIVATE knowledge of an assignation, bars not the debtor from making payment. See assignation.

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HE who has a decree in a double poinding, for a principal sum and expenses, against a principal party not appearing, he will bruike the duties received so long as the decree stands unreduced, because the decree and act of parliament make these duties

Saves from repetition of the fruits, not of the value or price of the subject itself.

actus bona fide perceptor: but he may be decerned to pay back the principal sum, if the party who was absent, now pursuing, show manifestly that his was a preferable right. Had. 18. July 1610, Johnston.—A party receiving an ox by mistake, which was sent in compliance to another, and the receiver supposing it sent by some friend in the country, who had forgot to write with

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with it, and consuming it in his family, the Lord, in a pursuit for the price, repelled the defence of *bona fide receptum et consumptum*, and found him liable in paying the ox *sine causa*. Tount. 29. Nov. 1698, Fair.

AN adjudication, long after the expiry of the legal year, being restricted to a security, because more was adjudged for than was due, the Lords found the rents intromitted with after expiry of the legal, while the judge, *bona fide*, considered himself proprietor, unaccountable, did yet impute to extinguish the adjudication. Home, Jan. 1720, Walker.—The 20. June 1722, Comperion Ruthven &c. Feb. 1732, Balfour.—Bruce, 21. Jan. 1715, Erskine.—A lady, being provided in her contract of marriage, to the house and parks indefinitely, and the Lords having found the provision was to be understood of such parks only, as the husband kept for the use of his family, not of such as were set out for rent; they now found, That she could not retain the rent of these, as *fructus bona fide percepti*, even before interlocutor, in respect she had a jointure out of the estate, by way of annuity, in payment whereof the rent of these parks ought to be imputed *pro tantum*. Harc. (Escheat) March 1683. Donatar to Buchanan's escheat.—Tho' an apprising was declared to be extinguished within the legal, yet a part of the comprised lands coming, in the person of a singular successor, to the appriser, was found *titulus bona fidei*, against repetition of the fruits intromitted with by the singular successor; but it was found, That if there was another debt due to him at the time of his intromission, by the party whose lands were apprised, it ought to be applied towards the satisfaction of that debt. Harc. (Comprisings) Jan. 1683, Lady Hilseside.

Possession upon a right, good ex facie, tho' liable to objections.

IN a special declarator, of a rebel's liferent escheat, against an intromitter with his rents, the Lords found his preceding intromissions to have been *bona fide*, the fruits being *percepti et consumpti* by the defender, who was never interrupted in his possession by the superior.

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's donatar; and this, altho' the defender's right was granted after the rebellion, which was found sufficient for bygones, but not to defend him for time coming, since the citation in the special declarator. Dur. 19. Feb. 1635, Cunningham.—A creditor to a father, being by him put in possession of some of his son's lands for security of the debt: the defence, That the son's right (whose administrator the father was) had never been intimated, was found sufficient to liberate that creditor, when pursued by the son for bygones. Dur. 2. Dec. 1635, Home.—A lady, being provided in her contract of marriage, to a liferent of some teinds in her husband's person, for many years to run, pursuing a party who had comprised these teinds, and intromitted after dissolution of the marriage, by divorce; the Lords found him not liable for bygones, notwithstanding her preceding right, because he was *bona fide* possessor. Dur. 1. March 1637, Manderston.—Found, That the courtesy, being a benefit competent to the husband, who did not seek the same, conform to the custom of the kingdom, that therefore his executors could not pursue for it, especially after a track of several years, where the rents of the lands were, *bona fide*, uplifted by virtue of an heritable title, competent to one who had bought the lands from the heiress's heir. Dur. Spot. (*Curialibus*) 19. Jan. 1636, M'Aulay.—Found, That an heir, pursuing a process of aliment against his mother, liferentrix, will get nothing modified for the years preceding the summons, the defender having, *bona fide*, consumed her whole annuities these years; and the liferented lands not being ward lands, which, by act of parliament, are burdened with the heir's aliment, but lands feu or blench, to which the act is extended by practice only. Harc. (*Aliment*) Falc. 27. Nov. 1685. The heir of Kirklands.—A bishop, having granted a liferent commission of the office of procurator-fiscal of his commissary court, and a succeeding bishop having turned him out, and given a commission to another, who continued in possession some years; but the liferent commission, being thereafter found effectual, and the party reponed to his office, by sentence, he insisted against the other for the *interim* profits, as to which the exception

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was sustained of *bona fide* consumption. Dur. 17 Feb. 1624, Thomson.

A TENANT's tack having been reduced, because

*Possession upon
a right null ex
facie.*

it bore to be set by a minor, with consent of his curators, and yet none of them were subscribing, and now the tenant craving allowance for expenses of the meliorations and improvements

he had made of the subject, during the first six years of the tack, he having possessed, in all, about twenty years, the Lords found him *mala fide* possessor, because of the tack being null *ex facie*, and, therefore, that he could have no allowance for his improvements; and, that any were due, they were more than compensated, or reimbursed, by his long lucrative possession posterior thereto, tho' this *lucrum* was the effect of these improvements. Fount. 3 Jan. 1711, Cardross. — In a process, at the instance of the king's advocate, against persons excommunicated, for the value of the corns growing upon the lands possessed by themselves, in several years after the excommunication; the Lords allowed them defalcation of the seed, seed, servants' fees, and other expenses of labouring the ground, and winning the corns; but refused to allow any deduction for the entertainment of themselves and families; and repelled the defence of *bona fide percepti et consumpti*, in regard of the preceding excommunication; And as to the rents uplifted by them from their tenants, they decreed against them and the tenants conjunctly and severally therefor. Dur. 26 June 1629, King's advocate. — In a process, at a minister's instance, for stipend founded upon an old decree of modification and locality, it was pled for the defender, That some years ago, he had obtain'd a decree of valuation of his tithes, where they were valued at a less duty, than the proportion of the stipend imposed upon his lands by the old decree of locality; and that, altho' his decree of valuation stands now reduced, by the oversight of not citing the minister, yet, while it stood, he could be liable to a higher duty than conform thereto; and that he was at least, *bona fide* possessor. The Lords repelled the defence of *bona fide*, in respect of the minister's standing decree of modification and locality. Fount. Forb. 7 July 1711.

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1708, Reid.—A wife's right in lands, constituted by infestment, taken in terms of her contract of marriage, so effectually extinguished by the husband's death, within year and day after the marriage, that it does not afford her even a colourable title of *bona fide* possession, to make *fructus perceptos et consumptos suos*, though the infestment proceeded upon a new right granted to the husband by his superior, and contained no clause bearing relation to the contract of marriage. Dur. 10. Nov. 1633, Grant.

A DONATION, by a husband to his wife, being revoked by a posterior donation to the children, in accounting for the interim profits, the wife was considered as a *mala fide* possessor, because she knew of the right made to the children; for, though in every case, private knowledge infers not *mala fide*, the case of a mother knowing the right of her own children is singular, seeing she was thereby obliged to have sought tutors, and preserved the right. Stair, 20. Nov. 1662, Children of Wolmer.—A relict was decreed to repeat rents of lands which were provided to her in liferent, in respect she had consented to the alienation thereof, made by her husband, in favor of the pursuer. Dur. 22. March 1628.

A PARTY possessing, without interruption, by virtue of a posterior infestment, being pursued by a party having a prior infestment, is safe, *quod praterita*, before the interruption, as being *fructus bona fide percepti et consumpti*. Dur. 26. Jan. 1636; Borthwick. Dur. 9. March 1624, Monipenny.—In the reduction of a feu, *ob non solutum canonem*, it was found, That the defender was in *bona fide* not to pay the same, having the first disposition of the superiority from their common author, though the pursuer was first infest, but without having done any thing upon his right to make interruption. Dirl. 14. Dec. 1676, Argyle.—An adjudication, with a decree of mails and duties, against a person, after he was year and day at the horn, but before his liferent escheat was gifted, was sustained as a title of *bona fide* possession to the adjuger,

Private knowledge of a preferable right.

If a preferable infestment, without interruption, will induce mala fides?

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ill he was interpellated by a general decree of declaration of the liferent eicheat. Forb. 26. Nov. 1712. Douglas.

Reduction of the author's right, if it will induce mala fides against the acquirer, without interpellation? *BONA fides* was found to defeat a tacksmen of teinds from bygone, tho' the setter's right was reduced in parliament. Stair, 19. July 1664. Douglas.

IN a special declarator, at a debtor's instance, against the rebel's solicitor, it was alledged for the defender, That she consumed and disposed of some part of the goods acclaimed, in the deceased's funeral expences, her mournings, and maintainance of her family, till a term; that the goods were so employed before the gift or declarator, and that the defender was in *bona fide* to do so, not knowing of the rebellion. The Lords sustained the rebellion.

A Deceased's goods intromitted with and applied before his eicheat was gifted. *Bona fides.* Harc. (Eicheat) March 1686, Eoch.

IN a suit for the half of the bygone mails and tithes, at the instance of one heir portioner against another, the defender was, that the pursuer having gone to Barbadoes, and being reputed dead, the other served himself sole heir, as that the bygone were *bona fide periti et consumpti*. Answered, The presumption lies for the pursuer, that he was still alive, and that his father appeared before inquest, and protested accordingly. The Lords repelled the defence. Fount. 12. Feb. 1697. Cockburn.

One heir portioner intromitting with the whole rents, believing the other dead. THE Lords having found a comprising extinct by intromission with the legal, and yet refusing to turn the defender, being minor, out of possession, because of the maxim, *Minor non tenetur placitare*, &c. In a suit after his majority, he was found to be a *bona fide* possessor, and paid the bygone rents. Fount. 9. Dec. 1699. Falconer.

Minor qui non tenetur placitare, is a bona fide possessor, tho' his right should be reduced after majority.

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AN heritor possessing his own teinds, by virtue of a back from another, as tackman, found to be *bona fide* possessor, until interpellated by the real titular. 25. June 1731, Sterling of Herbertshire.—In a pursuivant against feuars, at the titular's instance, for the teinds of their lands intromitted with by them, the defence pleaded for by-gones was, That they had been in use, past memory of man, to pay a certain duty, in name of teind; to the minister of the parish, presumed to have had a title, since no other titular did appear; and therefore, *quoad* the residue, they were *bona fide* possessors. Answered, Ministers have a right to maintenance out of the teinds, but cannot be presumed titulars, especially since the act 1690, which gives to the patron the small share of teind then remaining with the clergy; and the receipts of teind-duty, taken from the minister by the heritors, destroy this presumption, bearing, for teinds payable to him, the minister, out of the lands; so that the receipts do not so much as insinuate that the minister was titular, or had a power to discharge the whole teinds. It was found, That the sums paid to the minister, do not exoner the heritors from paying the remainder of their teinds to the titular, and that they were liable for forty years preceding the citation. 25. June 1731, Sterling of Herbertshire.—This decision was reversed by the House of peers, and payment to the minister for forty years was sustained as *bona fide* payment, *quoad* the whole teinds, which seems to be reasonable, for the heritor must uplift the teind, to save it from perishing in the tenants hands, and, it would be hard, to oblige him to be another man's factor without a salary.

THE Lords refused to sustain process for by-gone duties, payable out of the defender's hands, where the pursuer had not been in possession, tho' he kept his process in agitation for an hundred years; but sustained it only from the last waking, these duties not being contained in the defender's investments. Gilin. Jan. 1666, Lord Justice Clerk.—A back of teinds quarrelled by reduction,

Mala fides induced by process, whether it will take place from citation, litiscontestatio, or decree?

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as set by a person after he was deprived, the decree was declared by the Lords to take effect, *a tempore litis contestatæ*. Had. 2. June 1600, Hunter. — In reduction of a tack of teinds, the Lords did not give effect from the time of the fallzie, *sed a tempore litis contestatæ* only. Hope (*Reduction*) 4. March 1617, Seaton. — In a reduction, of land-rights, it appearing by the pursuer's production that he was clearly preferable, the defender was found liable to accompt for the mails and duties from the citation. Stair, Gosf. 23. Feb. 1672, Gray. — In a reduction and improbation of a disposition granted to a woman, and assigned by her to her husband, in their contract of marriage, the husband was not found liable for the bygone profits from the citation, but from the time only that clear evidence was brought of the nullity and falsehood of the disposition. Stair, Ff. July 1675, Fuhmarton. — The alledgeance of improbation, which is ordinary and of course, not being sustained, but reserved, was not found to induce *mala fides*. Stair, 14. Dec. 1677, Dick. — An executor nominate, being appointed, by testament, to lay out a sum upon a tomb to the defunct, and having begun the work, was found not to be put in *mala fide* to complete the same, by a process of reduction of the testament; and therefore, the expence of the work was allowed out of the first end of his intromissions, tho' the testament was afterwards reduced, upon this plain ground, That the testator was *in extremis*, and insensible, when made to subscribe the testament. Fount. 20. Feb. 1712, Moncrief. — The Lords, according to the circumstances of the case, may sometimes reduce a writ, *ab initio*, and sometimes, *a tempore litis contestatæ*: Thus they reduced a bond and tack of teinds granted *in lectis*; *a tempore litis contestatæ* only. Auch. (*Reduction*) 10. Feb. 1699, Balcarras.

A SUM taken out of a person of qualities responsible at his death, and expended by his *Later decisions*, lady, on the maintenance of the family to a term, was allowed to an executor, as *bona fide* spent. Falcon vol. I. p. 136, Balmorino, 18. Dec. 1746.

THE rents of an estate, discharged by a *bona fide* possessor, on bills granted by the tenants, were held to be *fructus*.

Nullus percepti. Falc. vol. I. p. 74. Leslie, Feb. 13. 1748.

THE rents of an estate, uplifted by a person, found to have right thereto, before serving an appeal, on which the judgment was afterwards reversed, were found *bona fide percepta.* Falc. vol. II. p. 224. Creditors of Kinminity, 23. Jan. 1751.

AN heritor in a parish, which had formerly belonged to a provostry, having paid stipend to the minister on receipt, as the proportion of teind payable out of his land, and pleading against the patron, that this exempted him from further payment for years past, because the remaining teinds were *bona fide percepta et consumpta*; he was, notwithstanding, found liable. Falc. vol. II. p. 4. Smith, 8. Nov. 1748.

A LADY, having obtained possession of an estate upon a disposition which was afterwards found null, her *bona fide* intromission with the rents, was found not to impute in extinction of the principal sum due to her by a bond of provision out of the estate, but only in extinction of the annualrents. Fac. Col. vol. II. p. 101. Gordon, 1. Dec. 1757.

MALA fides induced by a process, found to take place from the first interlocutor. *Ibid.*

BONA FIDE PAYMENT.

FOUND, That a tenant was in *bona fide* to pay his mail to his master, altho' it was notour, that the master was guilty of high treason; but the process was only in dependence in parliament; and no sentence of forfeiture pronounced. Mail, 14. May 1555, Abbot of Balmerinoch. — A rebel dying, after the term of payment of farms of his lady's jointure, by a former husband, and the tenants having paid their lady thereafter, who was infest; this was found *bona fide* payment as to them, when afterwards pursued at the instance of a donatar to his escheat; only action was reserved to the donatar against the lady, and the tenants ordained to furnish him probation, which might verify her receipt of the farms, whenever the donatar should pursue her. Dec. 24. July 1624, Donatar of Sir William Stewart's liferent. — Tenants are not in *bona fide*

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fidē to pay their duties to their master, who is in the
 entries, after the action of non-entry intended against
 them, but should suspend upon double pointing. 14.
 17. Dec. 1622, Viscount of Annand.—In an action,
 the instance of a prelate, against intruders with teind
 for payment of the old duty, the Lords found this ex-
 ception relevant, viz. That they had paid to their mas-
 ter, who set the lands, with the teind, to them for
 certain duty, as for stock and teind undistinguished.
 Gosf. 24. Nov. 1671, Urquhart.—And this, altho' they
 had made payment to their master, even after they
 were cited in this cause; because the tenants could not
 know what part of their duty to retain upon account of
 the teind. Dur. 21. March 1628, Murray.—An ex-
 ception against a spulzie of teinds, That the defender
 had paid their old duty to the minister for the year pre-
 belled, by order of the pursuer's chamberlain, sustained
 notwithstanding there had been an inhibition executed
 the year preceding, seeing it was not renewed for the
 year controverted. Dur. 13. Feb. 1627, Linlithgow.
 —A spulzie of teinds was elided by this exception pro-
 posed by tenants, viz. That they had paid to their own
 master, who was heritor of the ground, which the
 Lords found *bona fide* payment, notwithstanding an
 inhibition of those teinds served and intimated to them
 previous to the said payment. Dur. 12. Dec. 1627,
 Hepburn.—After inhibition of teinds, the tenants
 continuing to pay the person in possession as formerly,
 their defence was repelled, because there could be no
 presumption of *bona fides* after inhibition. Dur. 21.
 March 1628, Blantyre.—A tenant, having paid his rent
bona fide, to the deceased heritor's second son, held and
 reputed the apparent heir, in respect that his elder
 brother was long absent out of Scotland, and thought
 to be dead; the Lords sustained the payment, as suffi-
 cient to exoner him at the instance of one pretending
 right to the said rent, by assignation from the eldest bro-
 ther. Forb. 22. Feb. 1711, Terrie.—The Lords found
 That payment made by a tackman to the apparent heir,
 who set him the land, and made before any intimation
 to him of a decree of preference, at the instance of a
 herentrix, who was infest, was made *bona fide*, tho'
 the process for preference commenced before the sett,
 whereby

BONA FIDE PAYMENT. 189

whereby the subject was rendered litigious. Bruce, MSS. 4. July 1716. McGill — A tenant's exception of *bona fide* payment to another, before inteting of the cause, which other he offered to prove heritably infest, was repelled, because the defender had paid two years immediately preceding the year in controversy, to the pursuer's author. Dur. 18. June 1629. Porterfield.

PAYMENT to ministers, who had fallen from their right, not having obtained presentation and collation, was sustained, because, notwithstanding, they were allowed to preach, and the heritors were not interpellated by the collector of the vacant stipends. Stair, 10. Feb. 1666. Collector of the vacant stipends.

PAYMENT being made to one confirmed executor, *quæ* nearest of kin to the creditor, the same was sustained, tho' the creditor was a bastard, and could have no nearest of kin, which the debtor was not bound to know. Dur. 18. March 1626. Paterfson. — The like: Goss. 25. July 1676. Thomson. — The Lords found, That a debtor to a rebel, whose liferent elcheat was gifted, was in *bona fide* to pay him, and accept of the rebel's discharge *quocumque tempore*, before the special declarator; and that a general declarator does not put the rebel's debtor in *mala fide*, the citation being only general at the market cross. Newb. 10. Jan. 1666. Pennyquick. — The like: Dur. Spot. (*Elcheat and liferent*) 31. Jan. 1628. Clegg-horn. Had. 10. Feb. 1610. Blackburn. — Payment, *bona fide*, of a particular bond, was sustained, tho' after inteting of reduction, seeing there was no special reason of reduction filled up as to the bond in question. Stair, 19. July 1662. Montgomery. — The purchaser of an estate, upon which there was an infestment of annual-rent, having made payment of the same to an heir, who had only a general service, and had not established the infestment in his person, this was not found to be *bona fide* payment, because he might have seen the infestment in the register, and ought to have known the defect of the creditor's title. Jan. 1729. Competition between Halkerton.

Payment to a minister after he had fallen from his right.

Payment made to one who is not the true creditor.

Halkerton and Drummond. — The relief shall be denied action against her husband's debtors, unless she is compelled, but only against his executors; and therefore it was found unwarrantable in debtors to pay her a third of their debts, without sentence; and that, notwithstanding thereof, they were obliged to pay the whole to the executors, without any deduction. Dur. 9, Dec. 1623. Mackie.

AN arrestment being laid in a person's hands, in the common edictal way, when he was beyond seas, in his majesty's service, and he having also paid the debt before the forthcoming was raised, the arrestment never having come to his knowledge, yet the Lords repelled the sentence, and intimated the arrestment. Pount Dal, 22, July 1701; and 10, Dec. 1703, Blackwood. — Intimation of an assignation being made only to a cautioner, the Lords found, That the principal was *bona fide* to make payment to the cedent, so as to liberate him and all the other cautioners, no intimation being made to him. Fac. 23, Feb. 1610, Lyon. — The like, where intimation was made at the market-cross of the head-burgh of the line, which was no regular intimation. Dur. 21, July 1603, Home.

A DEBTOR, having transacted with the supposed creditor, and obtained his discharge, his *bona fides* was only found relevant for what was truly paid. Stair, 10, July 1665, Johnston. The like; Stair, 14, Dec. 1661, Home.

BONA fide payments, in part of a bond, in the English form, were sustained against an *Estor* decisions. signee, who had not intimated the right. Fac. Col. vol. II. p. 315. Johnston, &c. 27, Feb. 1759.

BOND of PRESENTATION.

A PRISONER having given bond of presentation, with a cautioner, the Lords found, That tho' the messenger did not attend, at the time and place of presentation, to receive him, yet that this did not excuse the other party's absence; but found that the cautioner, for his own liberation, ought to have presented him at the place and time appointed, and taken instruments, if there was none to receive him off his hand, after the example of using an order of redemption. Fount. 22 Nov. 1695, Pirbright.

A BOND of presentation found implemented, tho' the debtor was not produced, till a day after the time appointed, which being *modica mora* was not regarded, unless the creditor could instruct some detriment by the delay. Stair, 10 Feb. 1663, Southesk. Stair, 16 Nov. 1673, Kennoway. — A party having given bond of presentation for a man under caption, and failing to present him at the day, but offering yet to produce him, *cum omni causa*; the Lords granted him a new day. Auch. (Caption) 14. Dur. 22 Jan. 1629, Scrimzeour. — A person obliged to present a rebel on a precise day, between two and three o'clock, not having offered him till between seven and eight, being charged for the debt, suspended upon this reason, That their journey was retarded some hours, on account that the day of presentation was a public fast day, by authority; and that the rebel was carried to the pursuer's house, and offered to him, but that he refused to accept of him; and the defender, not being master of the caption, could not put him in prison. The Lords sustained the reason, the suspender giving his oath, that the feast was the reason he was not presented, at the precise hour, and burdened the suspender to present the rebel, *cum omni causa*, within fifteen days. Hare. (Caption) 3. March 1682, Ockley.

A PARTY

A PARTY having granted a bond of presentation for a prisoner, to present him at a day,

Excuses for not presenting. and then appearing and asserting, that the prisoner having fallen sick, he was

willing again to bind himself for him within a few weeks thereafter, which the creditor

refused, the Lords found, That even tho' the cautioner

should prove that the prisoner was really sick at the time prefixed, this did not free him, seeing he did not

offer to present him when he recovered, and therefore found the cautioner liable. Fount. 12, Feb. 1704, Calender.

—One being pursued on a bond of presentation, it was not sustained as a good defence, That presenting

the debtor had become *factum impressibile*, he having been taken prisoner by virtue of another caption; tho' sickness, death, or other accident, occurring, not

the debtor's fault, is relevant, if the party be offered soon as the impediment is removed; yet this cannot be

extended to any impediment occasioned by the debtor or his cautioner's fault. Stair, 7. July 1681, Pollock.

A PARTY having given bond to present one, who was prisoner for debt, by a day, without an expedite

Clause to present free of suspension, &c. expede suspension, past bill of

list of execution, otherwise to pay the debt, and having accordingly presented him to the messenger, on that day

but the party himself producing an attestation, that he was intitled at a dragoon, which, by act of parliament,

secures him against all personal diligence, the bond was found not fulfilled, seeing the debtor was not presented

free of all impediments, to be disposed of as he might have been done at the time the bond was accepted of, in place of his person. Forb. 27, Fount. 1710, Henderson.

A BOND of corroboration is null, *quoad* the cautioner, where the sum corrobored

Later decision. happens, by oversight, to be put in the binding clause. Remark. p. 206. Coult, 2. June 1749.

B R E V I M A N U.

STOLEN, or strayed goods, may be recovered summarily, without process or sentence, even from possessors, *bona fide*, who have paid an enormous price. Stair, 7. July 1671, Strachan.

IT was found, That the king may enter, *brevi manu*, to any part of his annexed property, whereof the feu is not lawful, without any warning or other order. Had. Feb. 1598, Creech.

IN a spulzie of teinds, the Lords found, That altho' the pursuer had no right thereto, and that the defender alone had right to the same, yet the defender could not, *brevi manu*, without warrant of a judge or sentence, enter himself to the possession of the corns which were sown and win by the pursuer, from off the lands pertaining to the said pursuer; and that he could not take the teind at his own hand, without concurrence or consent of the pursuer. Dur. Spot. (*Ejection and Spoliation*) Auch. (*Spulzie of teinds*) ult. Jan. 1628, Nairn. — A person having right to teinds, and using inhibition thereon, cannot turn out the possessor, *brevi manu*, if he has any pretence of a title. Stair, 27. Jan. 1665, Berford.

IT was found, That the donatar to the escheat of a party denounced for a crime, may, *brevi manu*, intromit with the rebel's moveables, but cannot enter to possess his lands, which fall not under single, but several escheat, and so must abide declarator. Had. penult. Jan. 1593, King. — Lords, and bailies of regality, having right to the escheat of transgressors, without being accountable to the king, may, *brevi manu*, intromit with the escheat goods, without a declarator. Stair, 6. Dec. 1673, Innes.

Stolen goods may be seized brevi manu.

King may enter, brevi manu, into possession of his annexed property, that had been alienated.

Intromission with teind brevi manu.

Donatar brevi manu intromitting with the rebel's moveables.

A PEDLAR, having left his pack in a creditor's hand for security of the debt, the creditor by warrant of a magistrate, came to inventory and price the wares, and disposed of the same. This was not relevant; for, the pack being impignorated, the defender could not apprise it primarily, but behoved to take a sentence to pound the same. *H. Stair*, 3. Jan. 1667.

Intromission with goods impignorated. **A TACKLER**, having, in security of arrears due by him, disposed of his master's certain corns, and having further obliged himself to pay the sum at a term, with liberty to the master, in case of failure, to intromit *brevi manu*; the master was found intitled to intromit at his own hand, without necessity of declaring the failure by the authority of a judge. *Stair*, 10. Dec. 1661. *Dewar*.

THE LORDS thought, that where a tenant steals his corns, as soon as reaped, to another heritor's ground, the master may take the rest, and stack them for consideration, but may neither call them nor dispose of them without a decree, and formal pointing of the same. *Fount.* 15. 1700. *Salton*.

IT was found that a pupil, tho' above seven years old, cannot be taken *brevi manu* from the tutor from the mother, without authority of a judge, but must be restored again, altho' the tutor's intromission was by the father's express order on deathbed. *Colv.* 21. Jan. 1570. *Giffart*.

A MILLER cannot lawfully seize horses and mares abstracted from his mill, tho' contrary to his right of shirlage, upon sentence of the statute of King William, giving that power, even tho' he proves such seizures to have been customary in the neighbourhood. *Dur.* 22. 1635. *Menzies*.

Intromission with a tenant's corns. **IF A MILLER** can *brevi manu* seize corn abstracted from his mill, tho' contrary to his right of shirlage, upon sentence of the statute of King William, giving that power, even tho' he proves such seizures to have been customary in the neighbourhood. *Dur.* 22. 1635. *Menzies*. *Dur.* 24. March 1635. *Inter om.* in a process of spulzie, in the like case, the defender founding upon the above statute, the Lords sustained the defence as to the sacks of corn, and absolved the defender from restitution thereof; but found him liable

or restitution of the horse. Falk. 1. Dec. 1683, Thin.

A PROPRIETOR may hinder the building a dam upon his ground, without necessity to ledge detriment; but where a waulk-mill was once established, and a going mill 48 hours, it was found, That the proprietor, upon whose ground the dam encroached, could not, *brevi manu*, without authority of a judge, demolish the dam or mill. Stair, Dirl. 22. June 1687, Hay.

If the master can dispossess the tenant, *brevi manu*, where he has agreed to remove without warning. See removing.

A mill, once set is going, cannot be demolished brevi manu.

BURGH ROYAL.

A PARTY, suspending a charge to accept of the office of bailie of a royal burgh, upon the Act 1469. cap. 29. which prohibits magistrates, within burgh, to continue in office longer than a year, as he had now done; the Lords found the reason of suspension relevant. Stair, Dirl. 2. Jan. 1688, Wilson.—The old council, yearly, at Michaelmas, must chuse a new council; but that imports not that every person in the council must be changed, but only the *major part*; and these two councils, with the deacons of the trades, elect the provost and bailies, dean of guild, treasurer, and all officers within burgh. Stair, 27. Jan. 1687, Jack.—No person can continue to be provost, bailie, treasurer, dean of guild, or other officer within burgh, except counsellor, more than two years. *Ibid.*—A burgh is not obliged to erect deacons of trades, unless, where the good of the town so requires it. Stair, 20. Jan. 1681, Trades of Bruntland.—The acts of parliament, providing, That officers in burghs shall be traffickers, concern only the office-bearers, and not the counsellors. 26. Feb. 1736. Trades of the burgh of Dumfries.

Set of the burgh.

THE bakers of a royal burgh, being incarcerated by the magistrates for insufficient bread, the Lords refused their bill of suspension, until they gave obedience, as this was a matter of government, pro

Government of the burgh.

per and competent to the magistrates. Fount. 7. 1696. Bakers of Glasgow. — Magistrates may impose a scot for the utility of the burgh, but not without calling the whole incorporation, and proceeding with the consent of the major part of those who shall happen to convene. Stair, 11. Jan. 1678. Town of Aberdeen.

THE convener, and other deacons in a burgh, have no power to hold, or fence courts; yet they have right to make by-laws for regulating their own corporation. Deacons have no jurisdiction. Bruce, 17. June 1715. Magistrates of Aberdeen.

A BURGH royal having fenced a piece of ground on the side of the high way, leading to their town, for a yearly sum, pro burgal servitibus, and the high ways leading to the burgh being contained in their charter, but they using to fence a part of them where they were too broad, (as in the present case) the vassal, by the reddens of his charter, was found not liable to the burgal prestations of watching and warding. And as to quartering, assessments, militia, tillage, &c. they found, That the lands lay within the territory and jurisdiction of the shire, and so must pay cess, outreck, militia, and other burdens with the shire.

Fount. 24. Nov. 1698. Town of Edinburgh. — An proprietor of burgh-lands, not residing within the burgh, was found not liable to the scot for a second minister's stipend, nor for the charges of the commissioners of the burghs for keeping the convention thereof. God. Feb. 1669, Boswel. — No inhabitants can be scotred, except burghesses exercising trade or merchandise, and the alienary for their lands and tenements within burgh.

Stair, 11. Jan. Fount. 22. Feb. 1678. Town of Aberdeen. — Found, That none of the acts of parliament touching the scotting of inhabitants within burgh, for defraying the public burdens, could reach such as are under the denomination of writers, as neither being under the words of *traffic, merchandise, and change*, mentioned in one of the old acts, nor of *rents and holding within burgh*, in another old act. Fount. 13. Dec. 1695. Town of Glasgow. — The burghess of a town, tho' he be not *incubla*, if he trade, may be scotred for payment of his majesty's taxations. Digl. 16. Jan. 1677.

ROUND.

FOUND, That, within burgh, a person could not both
 be merchant and be a craftsman. *Monopolies*
 (Burghs.) Town of Aberdeen. *Burgesses con-*
 sidered in a mutual declaratory, between *non-residing*
 the merchants and trades of a royal *burgh of crafts-*
 burgh, touching the tradesmen keeping
 shops for selling staple commodities, the Lords sustained
 the declarator of the guildry, and found, That the trades-
 men, by our acts of parliament, are expressly prohibited
 from merchandising, unless they first renounce their craft.
 Point. 8. Jan. 1667, Guildry of Stirling. — Some surgeons
 and apothecaries, in a royal burgh, using also the trade of
 merchandising, and not being incorporated in any of
 the trades of that burgh, but being fined by the dean of
 guild for using merchandise, tho' they were only trades-
 men, the Lords found, That they having accepted bur-
 ges-tickets, with that express restriction, to practise on-
 ly *in arte propria*, the magistrates and dean of guild,
 might restrain and stop them from merchandising, un-
 less they renounced their trade. Point. Forb. 21. Dec.
 1711. Dean of guild of Aberdeen.

A NON-RESIDING burges has not the privilege
 of taking apprentices for the freedom
 of the burgh, or incorporation, and is *Non-residing*
 not intitled to carry on his trade by *burgesses*
 means of apprentices, or others. 1. Dec.

1738. Incorporation of barbers of Edinburgh:

THE Lords sustained pursuit for discharging unfree
 craftsmen to exercise their craft within
 the burgh; but they declared, that this *Monopolies,*
 prohibition extended only to their *whereby unfree-*
 working within the town, but not to *men are re-*
 hinder them to work within their own *strained from*
 dwelling-houses in the suburbs. Dur.

11. March 1628, Freemen weavers in *exercising crafts*
 within burghs.

Stirling. — The act 1566, part. 1399,
 intituled, *Exercise of crafts within suburbs adjacent to*
burghs, forbidden, does not take place where these su-
 burbs are within a barony. Stan. Goss. 24. July 1669.
 Town of Perth. But the Lords afterwards altered this
 interlocutor in part, and found, That the weavers might
 serve any in the landward, but might not come within
 the liberties of the burgh for taking up the work of the
 burgeses.

burghesses. Stair, 4. Dec. 1669, *inter eos*.—The Lords found, That a craftsman, living within a burgh of barony, may work to a burghess of a burgh royal, or any employing him, provided he carry not his made work into the burgh royal to be sold there. Gosf. 5. July 1682, Polmaise. — It was found not to be a suburb what was a mile from the royal burgh. Stair, 7. July 1671, Polmaise.

BURGHES royal may summarily seize upon staple wares of unfreemen, and judge thereon, but may not summarily incarcerate their persons, having only a privilege to charge them to find caution. Stair, 30. Jan. 1663, Town of Linlithgow.

THE penalty of unfreemen, importing goods into royal burghs, is only the confiscation of goods imported, and reaches only the same when apprehended in the importer's possession; but tho' out of his possession, he is still liable, by way of action, for confiscation of the goods imported, or value thereof, but no further. Stair, Dir. Gosf. 7. Dec. 1676, Town of Glasgow. Stair, 20. Dec. 1678, *inter eosdem*.—In a process between a royal burgh and a neighbouring burgh of barony, touching the extent and meaning of the act 5th, par. 1692, concerning the privileges of royal burrows; the Lords found, That, by the said act, the matter of trade is regulated after this manner; that as privilege is given to burghs of barony to import commodities not importable by them before; so, on the other part, royal burghs are secured from their incroachments; that they cannot import but the particulars allowed to them by the said act, and no others; and that they cannot have the liberty that strangers have, without which liberty there could be no trade between our merchants and strangers. Gosf. 6. Dir. Stair, 7. Dec. 1676, Town of Glasgow.

JUSTICES of peace have right to call for the use of town-houses of royal and head burghs of shires, and the magistrates of such burghs are obliged to make patent their town-house to the justices, at all times, for their meetings. 1. July 1733, Justices of peace of the shire of Wigton.

THE privilege competent to royal burghs of arresting strangers,

strangers, for payment of accounts taken on within the burgh, till caution be found to answer as law will, is competent to royal burghs only, not to the inhabitants of burghs of barony. *Privilege of arresting debtors, for debts contracted with in burghs.* Dur. 19. July 1623, Salmon. And only to burghs, who themselves have been the furnishers, and not where they were made assignees by creditors, not burghs. Dur. 1. March 1626.

And this privilege is confined to merchant-furnishing, and has no place with regard to any other kind of debts contracted within burgh. Had. 29. Nov. 1669, Kincaid; and therefore not to the price of a quantity of victual belonging to a burgh, and sold by him within burgh to a stranger. Guss. Feb. 1677, Dick.

THE question occurred, upon the act 1693, anent communication of trade, whether mechanics must bear any share with the merchants, of the tax laid upon burghs of regality and barony. The Lords, having considered the last clause of the act, "ordaining all traders and others, having benefit thereby, to be taxed," found the tradesmen liable, but not in an equal share with merchants, their concern being less, and more remote; but found this could not extend to inhabitants who had no trade, but lived on their own stock. Fount. 19. Jan. 1694, Baillie of Borrowslounness. *Act 1693, anent communication of trade.*

A DEBTOR, taken by caption, being presented to a magistrate, and not incarcerated, the burgh is liable. *Later decisions.* Falc. vol. I. p. 245. Gall, 10. Feb. 1747.

A BURGH is liable in the expence incurred by magistrates in possession, whose title was afterwards reduced, but not in the expence incurred in reducing it. Falc. vol. I. p. 366, Mairhead, 30. June 1748.

BOUND colliers being admitted burghs in a burgh, their votes, given in an election, were sustained. Falc. vol. I. p. 228, Burghs of Rutherglen, 20. Feb. 1747.

AN election, made on the ordinary day, by the minority of a town-council, without any of the magistrates, the remainder of the council alleging, they had absented for fear of rebels who were in the neighbourhood, was reduced for want of a quorum, tho' it was alledged

alleged that the other counsellors absented fraudfully. *Falc.* vol. I. p. 282. Counsellors of St. Andrew, 29. July 1746. *Sc. 28. 750. 271. 9. 1. 100.*

THE seat of the burgh of Inverkeithing. *Falc.* vol. I. p. 60. Cunningham, 29. Jan. 1745.

A BURGH, was found liable for debts contracted by magistrates, whose title was afterwards reduced. *Falc.* vol. II. p. 91. Muirhead, 12. July 1749.

AND for the escape of a debtor out of their prison. *Falc.* vol. II. p. 280. Parker, 21. Nov. 1751.

HERITORS, within a burgh, are not obliged to leave any distance between their buildings. *Falc.* vol. II. p. 185. Donald, 15. Nov. 1750.

IT was found, that a burghsman in Dunfermline, tho' a craftsman in any of the incorporated trades, may exercise the vocation of a vintner, by tapping and selling liquors for consumption in his own house. *Home* p. 262. *Hog*, 26. Jan. 1748.

THE constitution of a burgh royal, borrowed from the Romans. *Rem. Dec.* p. 187. *Lang*, &c. 26. Nov. 1748.

THE nature of its common good. *Ibid.*

IT was found, That in the election of a provost and bailies, resident burghesses, and heritors, being also burghesses, tho' not resident, have a right as electors, and none others. Found also, That none but those who are resident, can be elected bailies: but that it is not necessary the provost, or any of the counsellors, should be resident burghesses. *Remark.* Dec. p. 193. 7. Feb. 1749. *Falc.* vol. II. p. 59. *Falc.* vol. II. p. 79. 29. June 1749. *Falc.* vol. II. p. 82. 4. July 1749. *Anderson*, &c.

THE magistrates, and town-council of a royal burgh, not erected into a barony, cannot prohibit the importation of ale into the burgh. *Falc. Col.* vol. I. p. 42. *Miller*, 7. July 1752.

FREEMEN, and burghesses of royal burghs, carrying on a salmon trade, may employ unfreemen in making their salmon barrels, within the burgh. *Falc. Col.* vol. I. p. 44. *Coopers of Perth*, 8. July 1752.

ONE, declared by a sentence of the court of session, incapable of being a judge, may, notwithstanding thereof, be a counsellor of a burgh. *Falc. Col.* vol. I. p. 119. *Bucknay*, 10. March 1753.

ELECTIONS, for filling up vacant places in town-councils of burghs, made by ordinary meetings of council

cit. cannot be tried by summary complaint, upon 1610, Oct. 11. cap. 11. which relates only to annual elections. Fac. Col. vol. I. p. 150. Glasg. &c. 28. Feb. 1754.

IN a process, for reducing an election of one sett of magistrates and counsellors, and for declaring the election of another, all persons who are, or pretend to be, members of the council, must be made parties to the process, either as pursuers or defenders, in the principal summons, and it is not sufficient to call them by an incident diligence. Fac. Col. vol. I. p. 208, Gillies 18. Feb. 1755.

FOUND, that the act 5th, parl. 1672, does not give to royal burghs, a right of taking general arrestments in the hands of unfree traders without the burgh, and of calling them to deponé, in a forthcoming, as to the quantity which was in their hands, but that they must arrest the *ipsa corpora* of unfree goods. Fac. Col. vol. I. p. 279, Inhabitants of Stronachs, 24. Feb. 1756.

MANTUA-MAKERS may exercise their calling in royal burghs, without being free of the incorporation of taylors, altho' that corporation have the exclusive privilege of making all kinds of taylor-work. Fac. Col. vol. I. p. 317. Taylors of Perth, 10. Dec. 1756.

NON-RESIDING burghesses may be chosen counsellors of the burgh of Forres. Fac. Col. vol. II. p. 11. Dunbar, &c. 7. Jan. 1757.

IT was found, That tradesmen could not be elected merchant-counsellors of the burgh of Irvine. Fac. Col. vol. II. p. 42. Boyle, &c. 14. March 1757.—Reversed in the house of Peers.

MERCHANTS may make handicraft-work for exportation, notwithstanding the exclusive privileges of corporations; but cannot make for sale within the burgh, tho' they employ foremen who are entered with the corporations. Fac. Col. vol. II. p. 23. Hammermen of Glasgow, 18. Feb. 1757.

GOODS imported from London are not foreign goods, so as to fall under the acts 1672, cap. 5. and 1690, cap. 12. Fac. Col. vol. II. p. 176. Smith, 16. Dec. 1757.

INHABITANTS of royal burghs are liable in statute work on the high ways. Fac. Col. vol. II. p. 136. Trustees for repairing the turnpike roads from north-Queensferry to Perth, 14. Feb. 1757.

SOON

SOON after the decision, in the question betwixt the trustees of the Perth turnpike and the inhabitants of Perth, in which these last had pleaded, That no inhabitant whatsoever of a royal burgh, or burgh of regality, could be called out to repair the high-roads, and in which the court had found "the inhabitants, suspenders, liable in the statute-work of the turnpike-road in question," the trustees of the Glasgow turnpike ordered out several artificers and tradesmen of the town of Paisley, to amend the turnpike, leading thro' Renfrew-shire to Glasgow. — In a suspension of these orders, brought by those tradesmen and artificers, the Lords found, "That the whole inhabitants of the town of Paisley may be called out to repair the high-roads in time coming." The suspenders reclaimed. They did not insist for a general exemption of all the inhabitants within the burgh; on the contrary, they yielded, that labouring-men, or people used to country-work, even tho' living in a burgh, might be called out; and in so far they acquiesced in the decision pronounced in the case of Perth. But they pleaded, That merchants, artificers, tradesmen, and all others living within a burgh, who did not come under the description of labouring-men, tenants, cottars, or their servants, were not liable in the statute-work, and, at any rate, insisted, That the word *inhabitants*, in the interlocutor, was by far too general, as the law could never mean to put it in the power of the trustees to call out peers, judges, clergymen, women, &c. to the high-roads. With regard to artificers and tradesmen, the trustees answered, by repeating the arguments which had been used against these classes of men in the case of Perth; and, as to those in higher stations of life, whom it was alledged the interlocutor would authorize the trustees to call out, it was answered, That there were none of them called out by the orders suspended, and if they should afterwards be called out, there was nothing in the present decision (which regarded not a case in which they were parties) to hinder them to offer a suspension, and get redress, if redress was due to them. The Lords adhered, and refused the petition, reserving to the inhabitants, or any class of them, who shall think themselves aggrieved, to apply for redress.

redress, as accords. Fac. Col. vol. II. p. 148. Trustees of Glasgow turnpike-roads. 11. Jan. 1758.

UPON the suppression of a royal burgh, the heritors of lands, who formerly held them burgage within the territory of the burgh, are intitled to hold of the crown. Fac. Col. vol. II. p. 158. Urquhart. 17. Jan. 1758.

THE trade of a royal burgh is liable for part of the cess; but in what proportion is left to the discretion of the magistrates. Fac. Col. vol. II. p. 220. Willon, &c. 16. June 1759.

TRADESMEN, residing in a burgh of regality, or barony, adjacent to a royal burgh, cannot be subjected to the authority of an incorporation within that royal burgh. Fac. Col. vol. II. p. 458. Barbers of Edinburgh. 2. Dec. 1760.

THE magistrates of Kinghorn appointed the following regulations: 1^{mo}. That each person, passing the ferry, upon a Sunday, should pay half-a-crown over and above the ordinary freight. 2^{do}. That no person within the burgh should let horses to hire without being entered burghs, and paying L. 50 Scots; and that no burghesses should let horses without allowance of the postmaster. 3^{do}. That all persons who let horses or chaises within the town, or those who, being casually there, took a retour hire, should pay to the town 5 per cent. in name of postship. 4^{do}. That each ton of wine, landed at Kinghorn, from the passage-boats, should pay five shillings of shore-dues to the town. And, 5^{do}. That no person should act as a boatman, till he was admitted a burghess. — An action was soon thereafter brought, at the instance of the justices of the peace of the county of Fife, and several of the burghesses, wherein they concluded, That the magistrates had no jurisdiction to make any acts or regulations concerning the management of the ferry, and that the regulations, above mentioned, should be reduced. With regard to the general conclusion, the pursuers insisted, That all matters of public police, such as ferries over navigable rivers, the management and reparation of the high-ways, &c. were committed, by several statutes, to the care of the justices of the peace; and that their powers were more particularly confirmed by the act 1669, cap. 19. The defenders, on the other hand, contended, That they were

were authorised, by their charters, to make regulations concerning the management of the ferry: That, the their most ancient title-deeds were unhappily destroyed, yet they were still possessed of a charter in 1611, ratified by parliament in 1633, by which their ancient charters, granted as far back as the time of King Alexander and King David, were renewed and confirmed: That, by this charter, the king granted, " To the magistrates " and town-council of Kinghorn, the whole territory " of that burgh, with the pertinents thereto belonging, " as also the port and harbour thereof, with the " customs, anchorages, and all other duties and casualties " whatever, belonging to any free port or station: " also the port and harbour called Pettycurry, with the " customs and anchorages, &c. with power to the said " magistrates, and their successors, of making officers " within the said burgh, for the government and " ministration thereof, and of making laws within the " liberties of the said burgh, for the preservation of " peace and order, and with all other privileges and " immunities competent to any other royal burgh: That the attempt now made, upon the part of the justices of the peace, was a palpable incroachment upon the jurisdiction of the magistrates, as established by the above charter: That the powers of the justices, however ample in matters of public police, were expressly limited to the regulations of such ferries alone, as lie within the shires over which they are appointed: and that the legislature never intended to give them authority over ferries, situated within the liberties of royal burghs: That the jurisdiction of the magistrates of a royal burgh, was as extensive within its own liberties, in matters of public police, as the jurisdiction of the justices over the rest of the county: That the two jurisdictions were quite distinct and independent of each other; and that the town-council of Kinghorn, had accordingly been in the immemorial use of making regulations with regard to the ferry. To these arguments it was answered by the pursuers, That neither the charters, nor the immemorial usage founded on, could confer or confirm the privileges contended for by the magistrates: That the grant of a free port and harbour, contained in their charters, respected only the profits and emoluments

ling from vessels coming into and going out of such
 harbour ; but that it was a mistake to imagine that the
 property of the harbour was conveyed by these words,
 or an exclusive jurisdiction established : That the autho-
 rity of the justices of the peace is equally ample and ex-
 tensive, in every thing concerning the public police of
 the country, within the liberties of a royal burgh,
 as it is within any other part of the county : That
 the magistrates are not public officers, in the true
 sense of these words, as their powers are solely con-
 fined to the administration of those private affairs which
 properly pertain to, and are connected with the burgh
 over which they preside : That their jurisdiction is
 exclusive of all other jurisdictions, concerning every
 thing by which the interest of the burgh is immedi-
 ately affected ; but that, in other matters, such as a
 ferry, which is calculated for the conveniency and ac-
 commodation of all the lieges without distinction, a
 burgh, within which it may lie, has no more imme-
 diate concern than another, which may be at several
 miles distance : That a ferry was entirely *juris publici*,
 the inspection and regulation of which belongs solely to
 the public officers of police : That the justices of peace
 were these officers ; and that the grant of a free port
 and harbour could never take the administration of an
 affair of such public concern out of their hands, and put
 under the direction of those who were only possessed
 of a limited right to the profits and emoluments arising
 therefrom, and who could never be regarded as the le-
 gal administrators of the peace and order of the county.
 With regard to the duties and taxations imposed by the
 town-council, the magistrates contended, That nothing
 more had been done than what was usual in all the burghs
 within Scotland : That the insignificant duties imposed
 on the inhabitants, to be expended for behoof of the
 community, were justifiable by their rights ; and that
 they had been in the uniform practice of imposing what
 duties were thought expedient from time immemorial.
 The pursuers, on the other hand, contended, That
 these duties were illegal and oppressive : That the town's
 charter from the crown, so far from bestowing a sanc-
 tion upon such impositions, had expressly confined their
 right to the profits and emoluments arising from the

grant of a free harbour: That the immemorial usage pleaded in bar of the reduction, could be of no avail as prescription can have no effect without a fundamental title on which it can proceed: That the court has invariably found every exaction illegal which was unsupported by a title, and that usage, for the longest period of time, could never authorise such exaction as was lately determined in a case between the barbers of Edinburgh and those of the Canongate, who had submitted to pay to the others a certain proportion of their entry-money, for a licence to practise within their own liberties.—The Lords found, That the regulation of the ferry belonged properly to the justices of the peace: And also reduced the whole duties and taxations complained of, except a small duty of eight pence per tun upon wine imported at the harbour of Kinghorn, which of late had been increased to five shillings per tun: And likewise reduced the regulation with respect to burghesses-inhabitants only plying at the ferry, and letting chaises and horses. Fac. Col. vol. III. p. 199. Ed. of Moray, 14. June 1762.

IT was found, That the making of hose does not fall under the exclusive privilege of the incorporation of taylors; and that it is lawful for any person to carry on that business, without being subject to the control of the said corporation: And it was further found, That all freemen of the corporation may lawfully employ any persons, men or women, to assist them in carrying on any part of their business, whether in their own houses, or elsewhere; and reduced the regulations of the corporation, in so far as inconsistent therewith. Fac. Col. vol. III. p. 220. Whyte, 23. Nov. 1762.

MINORS cannot vote at a burgh election. Fac. Col. vol. III. p. 24. Rogers, 3. Feb. 1761.

MAGISTRATES, administration of the common law, how extensive? See Community.

PRIVILEGE of arresting for merchant-accounts. See Forum competent.

BUTCHERS.

THE act 7th. parl. 1703, discharging butchers from the burk or polling, by themselves, or others for their

CAPTIVE. CAUTIO JUDICIO, &c. 407

their behalf, directly or indirectly, more than an acre of land, under the penalty of L. 100 *scoties*, *provisis*, besides the forfeiture of the beasts pastured thereon, and the contravener's burger privilege, was found to concern only tacksmen-grassiers, and not to hinder butchers from using their own property for pasturing of cattle. Forb. Fount. 3. Feb. 1708, Malices.

C A P T I V E.

A PERSON being taken prisoner by the enemy, all actions against him stop till his return. *Bals. (Defender)* 31. July 1346; Home.—But execution by morning may go on against him. *Sinc. Oliphant.*

Cautio judicio fisci et judicatum solvi.

A CAUTIONER, *judicio fisci*, is freed by producing judicially the *Cautio judicio fisci* defender at any time, and protesting to be free; for thereupon the judge thought again to incarcerate the defender until he find new caution. *Dur.* 26. Nov. 1633; *Lindsay. Stair,* 20. Feb. 1666,

A DEFENDER, who had found caution, *judicatum solvi*, dying before sentence; it was found, That the cautioner was not bound for what might be decreed against the deceased's representatives. *Judicatum solvi.* *Stair,* 20. Jan. 1680; *Hodge.*

CAUTION, as law will, does not import *judicio fisci* or *judicatum solvi*, but only *judicio fisci* or *judicatum solvi*; and it was found sufficient to liberate such a cautioner, that he put the party in the provost's hands, who put him in ward; for tho' it was urged, That this was only *fiscus* him, *judicet*, but not *judicio*, yet it was repelled, because, if the defender is put in ward at any time during the process, the pursuer suffers no prejudice. *Stair,* 10. July 1666; *Thomson.*

A SHIP, being adjudged prize before the admiral, and

and the decree reduced before the Lords, in a repitition of the cargo, the cautioner *judicio sisti* and the defender, the stranger, to find caution *judicatum solvi*, according to the custom of the admiralty court. Fount. 18. Feb. 1696, Goety and Dunsrow, Dutchmen.—An admiral's decree being suspended, and turned into a libel, the defender was not obliged to find caution, *in initio litis judicio sisti et judicatum solvi*, as is done before the admiralty. Forb. 14. Fount. 16. Feb. 1710, Ross.

A PARTY being charged by the bailies of a burgh, to find caution, *as law will*, and doing accordingly, but thereafter obtaining advocacy of the cause, this was found to liberate the cautioner. Auch. (advocation) 1. July 1631, Row.—A cautioner in the admiralty court *judicio sisti et judicatum solvi*, was found not liberated by advocacy of the cause. Dur. 16. Nov. 1636, Stewart.

A CAUTIONER, *judicio sisti et judicatum solvi*, before the admiral, is not liberated by the death of the defender, during the dependence. Rem. Dec. p. 75. Dundas. 10. Dec. 1743.—Home observes this decision, 13. Dec. 1743.

THE like, as to a cautioner in a suspension. Rem. Dec. p. 76. Dickie, Dec. 1743.

CAUTION, *judicio sisti et judicatum solvi*, can be exacted before the admiralty court, only in maritime causes. Fac. Col. vol. I. p. 180. Rowand, 9. Jan. 1755.

A FOREIGNER is only bound to find caution, *judicio sisti*, and not *judicatum solvi*, unless in maritime causes. Fac. Col. vol. I. p. 225. Henries, 7. March 1753.

MESSRS Robertsons, Coutts, and Co. being creditors to William Baillie merchant in Brechin, in the balance due of an accompt-current with them, brought an action against him, before the high court of admiralty for payment of that balance, and interest thereof, *nomine damni*; and in this action, Charles Ogilvy, writer in Forfar, became Baillie's cautioner *de judicio sisti et judicatum solvi*; and Baillie was affoizied from that action.

by the admiral's decree. The partners, Messrs Robertson, Courts, and Company, brought a reduction of the decree of the admiral-court before the Lords; and, in this action, they called both Baillie the original defender, and Ogilvy, who was his cautioner before the admiral. In the course of this process of Reduction, the pursuers only insisted against Baillie; and they prevailed in obtaining reduction of the admiral's decree; and Baillie was found liable in the balance of the accompt, with expences. After obtaining this decree of reduction, the pursuers allowed the cause to lie over till Baillie became bankrupt; and, at about three years distance from the date of their decree of reduction, they raised a wakening, both against Baillie, and against Ogilvy, as his cautioner; and they alledged, as their reasons for raising this wakening, that, in the former decreture, the interest due on the balance of the accompt from the date of the citation, had been omitted; and also, that the decree was only directed against Baillie, the principal debtor, and not against Ogilvy his cautioner. When this wakening came before the Lord Ordinary, Ogilvy insisted, That he could not be bound by the bond of cautionry he had granted to the admiral-court, as Baillie, the principal, had been absolved by decree of that court. This defence, the Lord Ordinary over-ruled; and Ogilvy applied to the whole Lords by petition; in which he pleaded, That by his bond he only became bound, "as cautioner, *de judicio sisti et judicatum solvi*, for William Baillie merchant in Brechin, in the process depending before the high court of admiralty against him, at the instance of Robertson, Courts, and Strachan, merchants in Rotterdam:" And that, as the process of reduction was a new process before another court, his cautionry obligation could not be extended so far as to bind him in that process. All cautionry obligations are *strictissimi juris*, and cannot be extended beyond the words of the obligation, which in this case bound the defender no further than in the action before the admiral-court; and that it was not presumeable, that a judge-admiral, by ordering this caution to be interposed, meant to secure obedience to the sentence of any other court but his own. And, if the process before the admiral, in which the defender was cautioner, had been
cast,

cast, upon any informality of the libel or execution, the obligation of the cautioner was at an end, and tho' a new process had been raised between the same parties, and upon the same grounds, before the same court, yet the cautioner would not have been bound to answer for what might be determined in this new process, by the bond of cautionry he had given in the former action. And in this would have been the case in a new process, upon the same grounds, and before the same court, it must still more hold good, when the court, in which the caution was found, had pronounced a total absolvitor, whereby the process, to which the cautioner bound himself, *judicatum solvi*, was at an end. The obligation, supposed to lie on the defender, being extinct, the accessory obligation of the cautioner must fall along with it; and although the defender, Baillie, may be liable to the pursuers in the same claim, upon a new action brought before another court, yet such action cannot affect the cautioner, unless he consent to be bound *de nova, judicatum solvi*, in that after process. And, in support of what was here pleaded by the defender, a number of authorities were cited from the civil law, particularly L. 3. *judicat. solvi*, Voet lib. 2. tit. 8. *Qui satis dari cog.*; and some decisions of the court were also mentioned. Hodge, 20. January 1680. Lord Ross, 14. Feb. 1710, Forbes. It was answered for the pursuers, That the rigid principles of the civil law, upon the authority of which the defender, in a good measure, rests his plea, are by no means adopted into our law, further than they are supported by principles of justice and equity; and that even those founded on by the defender, were by no means settled, as appears from Voet, lib. 2. tit. 8. § 19. where he quotes a number of doctors, who are of a different opinion from that contended for by the defender. But, whatever shall be supposed to have been the rule in the civil law, in these *prætorie stipulationes*, where the caution was in an express form of words, and limited to the judgment that should be pronounced by a particular judge by name; yet these would not apply to the present case, because the caution found in the admiral-court was in general, *de judicio fisci et judicatum solvi*, and plainly refers to the pursuers claim in the action itself, which, tho' originally instituted in the court

of admiralty, must accompany the action wherever it goes; the manifest intendment of such caution being, to secure the pursuer in payment, or performance of what should ultimately be decreed to him: It is the same *judicium*, until it receives a final determination; and the summons before the original court, being the foundation of the whole, nothing can be decreed by the court of review that is not contained in that libel; and it is of no consequence, in what form of process the action is brought under review of the superior court, whether by advocacion, suspension, reduction, or appeal; as all these have evidently the same tendency to subject the cause to the judgment of the superior court. The doctrine insisted on by the defender, That the sentence or judgment of the original court must determine the effect of the cautionry-obligation, would lead into evident absurdities; for, according to that doctrine, supposing the defender to be condemned in the original court where the caution is found, but acquitted in a superior court, yet he behoved to pay, because the effect of the cautionry-obligation was to be determined by the judgment of that court, where the caution was found, as it is a necessary consequence, that, if the judgment of the original court must determine the cautionry-obligation, in case of an absolvitor, it must do so in case of a condemnator; and several decisions were founded on by the pursuers, particularly, Stewart, 16. Nov. 1636, Ralph Dundas, 13. Nov. 1743.—The Lords, upon advising the petition for the defender, with answers and memorials, found, That the defender was not bound by the bond of cautionry. But, upon a reclaiming petition for the pursuers, they altered, and found the defender bound by the bond of cautionry, and remitted to the Lord Ordinary in the cause, to proceed accordingly. And to this interlocutor they adhered, upon a reclaiming petition for the defender, with answers for the pursuers. Fac. Col. vol. III. p. 190. Robertsons, &c. 2. March 1762.

CAUTIO

CAUTIO JURATORIA.

CAUTIO juratoria was accepted from a person of quality, being joined with infestment of lands, altho' these lands were already much burdened. Cal. 1588, Forbes.—The Lords pass a suspension upon juratory caution, only for the greatness of the sum. Hope (*Suspension*) 28. Nov. 1611, Sauchie.—In a removing the *cautio pratoria* for the violent profits, being decreed for in course, the party, being a poor woman, and offering juratory caution, the Lords, because of the act 39th parl. 1553, refused to accept thereof; but declared, that they would admit such caution as she could find. Dur. 17. June 1630, Home. Dur. 10. July 1630, Bennet.—A suspender, himself, having petitioned to discuss upon the bill, the clerk not being satisfied with the caution he offered, the Lords remitted to the Ordinary to pass the bill of suspension, or to discuss on the bill, if the charger insisted, or otherwise to take the petitioner's oath, that he could not find a better cautioner than the person offered; the petitioner always consigning a disposition of his whole estate in security, and then allowed the Ordinary to expedite the bill of suspension. Bount. 6. Nov. 1684, Dobie.—A suspender having deponed, and consigned a disposition in common form; and the charger craving up the disposition, that he might take infestment thereon, because the suspender was *vergens ad inopiam*, and that the other creditors, during the dependence, might do diligence, and be preferred to him; the Lords, considering the inconveniencies of such a novelty, and that the ancient uniform custom was, that these dispositions were only consigned evidents, not to be made use of till the cause was discussed in favor of the charger; they therefore adhered to the former custom, and refused to allow the disposition to be given up, till the event. Bount. 4. Dec. 1696, Livingston.

A BILL of suspension, being offered of a charge for payment of a liquid debt, upon this reason, That the charger's father, the original creditor, had got an assignation for security, upon which he had intromitted, and was paid; and the debtor craving to have the bill pass

upon

upon juratory caution, the Lords devised a new piece of form, which was, to remit to the Ordinary on the bills, to grant diligence to the presenter of the bill of suspension, for recovering the documents of the charger's father's intromission, with this view, that if the alleged intromission was made appear, the bill should be paid upon juratory caution. 12. Feb. 1740, Lennox.

CAUTIO de RATO.

A GENERAL procuratory, granted by a man to his wife, to sue actions, was refused to be sustained by the Lords without *cautio de rato*. Col.—The like; where the husband was forth of the country; Had. 5. Feb. 1611.

IN an action, a stranger against a Scotsman, the Lords found, That a procuratory behoved to be produced from the pursuer, being absent, and that *in ingressu litis*, or else present caution to be found. Spot. (*Attorney*) 14. Feb. 1627, Pyramine. Durie observes it, as if both procuratory and caution were found necessary — Yet thereafter; in a like case, the Lords sustained process, the pursuer's procurators, either producing a procuratory before litiſcontestation, or else finding caution before that time. Spot. (*Attorney*) 15. Dec. 1629, Peterson.

CAUTIO MUTIANA.

A MAN being sued as acceptor of a disposition, *omnium bonorum*, with the burden of all the grantor's debts, and the burden bearing this quality, *Provided the debts doe not exceed the value of the estate*, the Lords refused to ordain the pursuer to find *cautionem mutianam*, to refund proportionally, if more debt emerged than the estate would be able to pay. Fount. 23. Nov. 1695, Canon.—A legacy being left conditionally, *if the legator follow the executor's advice*, the legacy was found due; but the Lords declared, in case the legator followed not the executor's advice, he should be liable to refund; but they would not oblige him to find caution for that effect, the condition being so general. Stair, 25. July 1662, Nasmith.

CAUTIONER.

CAUTIONER.

*When under-
good cautioner,
when expro-
missor?*

A PERSON, who wrote a letter to another, desiring him to delay Mr. Douglass for the price of the horse till Whitsunday next, and he would see to his paying of it, was found liable as cautioner, and not as *expromissor*, and therefore liable only *subsidiarius*, after discussing the principal party. Harc. (*Cautioners*) June 1681, Home. — An obligation granted by a third party to a creditor, to cause the debtor pay, or else to pay the debt himself, was found to be *fidejussory* only; and that any exception competent to the debtor, was competent to him as cautioner. Fount 20. Jan. 1693, Doull. — Graham of Mosknow, in the year 1687, “ became bound to pay to “ Captain Blair all debts or sums of money, and accounts “ relating by Irvine of Bonshaw, deceased, to the said “ Captain Blair, according to the instructions of the “ same to be given in by him.” Within the year of prescription of this obligation, Captain Blair’s representatives insisted in a process against Graham of Mosknow, for payment of two bonds, due by Irvine of Bonshaw, to Captain Blair. The defence was, That these bonds were prescribed. Answered, *1st*, That the prescription was interrupted by the foresaid obligation, *2^d*, Supposing the prescription to be run, *quoad* Irvine of Bonshaw, Mosknow must be liable upon his own obligation, which is not prescribed. Replied to the *1st*, Taking an additional security from a third party, will be no interruption, *quoad* the principal debtor, unless done with his concurrence; far less with a general obligation make an interruption, which is not taking a document upon any particular debt. Replied to the *2^d*, The defender is not an *expromissor*, who takes a debt absolutely and ultimately upon himself; he is only *adpromissor*, liable indeed directly to the creditor, but virtually cautioner, and entitled to relief. Hence, every exception competent to the principal debtor must be competent to him; and, if he should pay, he can have no relief; and the creditor has himself to blame, who allowed the debt to prescribe against the principal; as this must o-

perate

operate in favor of the cautioner, equally as if he had granted a discharge, and it is *triti juris*, that every security past from, *quoad* the principal, is, *eo ipso*, a liberation *quoad* the cautioner. The Lords sustained the alledgeance of prescription. 12. July 1735, Halyburtons.

A BOND, found simply null, because not subscribed by the principal, altho' the cautioner did subscribe. Had. Dec 1612,

—A cautioner bound as full debtor, conjunctly and severally, was found liable for the whole, tho' the principal was freed by a legal exception, one notary having only subscribed for him in the bond. Stair, 8. July 1680, Johnston.—A debt being claimed from a cautioner, it was objected, That the bond was null as to the principal, upon the act 1681, his subscription being only attested by one subscribing witness, tho' two are mentioned in the body of the bond, *et sublato principali corruit accessorium*. Answered, This is but a statutory nullity, which does not take away the natural obligation; nay, the bond, as it stands, is a good foundation of action against the principal, tho' the act 1681, furnishes him an exception against it. The Lords repelled the objection, and found the cautioner liable. Fount. 2. Feb. 1700, Hepburn.

A CAUTIONER was found bound, altho' the principal was not, the debt being an accompt subscribed by a married woman without her husband; so that the cautioner could have no relief off the principal. Dur. 28. Nov. 1613, Schaw.

A MAN having granted bond as cautioner, for a tenant, that he would pay his rent, and being charged upon this bond, after the lapse of five years from the removal, the Lords sustained this defence as sufficient to assoilzie the obligant in the bond, That the said bond was only an accessory, additional and cautionry obligation, to cause the tenant pay, so that any exception defending the tenant was competent

In what cases a cautioner may remain bound when the principal gets free? imo, If the subscription of the principal be null?

ado, Principal free as vel- titia viro.

3110, Free by prescription.

to him; and therefore, assilized him upon the act 1669 about the *quinquennial* prescription. Fount. 19. Dec. 1695, Doull, &c.

A CAUTIONER, in a suspension, being minor, but attested to be sufficient, the attester 4to, By minority, was found liable for the debt, he knowing that the cautioner was minor, and would be freed *ex capite minorennitate*. Gosf. 6. Feb. 1672, Earl of Kinghorn.

5to, By a pactum de non petendo. A PACTUM de non petendo made to a principal, frees not the cautioner. Stair, 10. July 1680, Leitch.

6to, Principal not bound, yet intromitting.

ONE being chosen collector of supply, gave bond with his cautioners to the commissioners, obliging them to make just compt and reckoning, &c. The principal becoming bankrupt, the cautioner insisted in a reduction of the bond, upon this head, that it was null as to the principal debtor, there being no witnesses designed to his subscription, and therefore not binding as to the cautioner. This the Lords sustained, notwithstanding the principal, having acted as collector, and uplifted, was truly bound to accompt for his intromissions. 8. Feb. 1728, Innes.—Action was sustained against cautioners, in a second act of curatory, altho' there was a prior, wherein the curators were chosen, and had accepted, and the act never reduced, nor they removed; and yet the second choice seemed thereby null, and therefore the cautioners not bound. But the cautioner here was convened for payment of a particular sum intromitted with by his principal, and which he was bound to accompt for. Dur. 5. Dec. 1627, Rollock.

AFTER the triennial prescription, a compt and reckoning was brought against the representatives of a drawer in a tavern, and against his cautioner, for wine intromitted with by the deceased, and it was offered to be proved by the cautioner's oath, that he heard the deceased acknowledge he was owing to the pursuer the sum libelled. The Lords found it not relevant to prove the debt by the cautioner's oath, in regard

regard it would not be probative against the deceased's representatives, and so the cautioner would be obliged to pay the debt without relief. Dalr. 9. Nov. 1699, Herdman.

AN executor's cautioner was found only bound for what was contained in the inventory, but not for concealments. Had. 25.

May 1593, Guthrie.—A cautioner, in *Cautioner, how far liable?* contract of marriage, being charged

by the relict, to employ 1000 merks upon annualrent for her liferent use, in terms of the contract, consigned the money at the bar, and insisted the relict should find caution to restore the sum to him after her decease. The Lords found the relict was not obliged to accept of this offer, nor find caution, but that the cautioner was bound himself to employ in terms of the contract. Dur. 2. July 1628, Nasmith.—A cautioner, in a contract of marriage, being obliged to infest the wife in certain annualrents, which her husband had out of lands redeemable, conform to the contract; and that how oft the lands should be redeemed, the money should be employed again for her liferent use, was not found to be liberated from the said obligation, tho' the wife was once infest in these annualrents, and had afterwards consented to the renunciation made by the husband, in respect it was a necessary deed, and could have been forced by an order of redemption, after which, it was incumbent on the cautioner to see the money re-employed. Dur. 4. July 1628, Hamilton.—The cautioner of a factor, upon a sequestred estate, found liable for annualrent of the factor's intromissions, as factors are liable by the act of sederunt 1690, altho' the bond of cautionry did not bear annualrent. Forb. 23. Jan. 1711. Creditors of Park-Hay.

CAUTIONERS, for a collector of the customs, bound conjunctly and severally with him, "That he should make just compt, reckoning and payment, of his intromissions to the tacksmen, and do exact diligence for bringing in thereof monthly, quarterly, or oftner, as required," were found liable for what the collector came short in his accompts, tho' the tacksmen had not used any diligence against him for payment all the

last three quarters of his management. Forb. 20. Feb. 1707, Wallace, &c.—A cautioner, for a public collector's cashier, being bound in this form, "That the cashier should accompt with the collector monthly, quarterly and yearly;" and, after discussing the said cashier himself, the cautioner being charged for his arrears, he suspended on this reason, That the charger had not called the cashier to accompt, in the terms aforesaid, he had delayed till he broke. The Lords repelled the reason of suspension. Fount. 18. June 1706, Hamilton, &c.

A CREDITOR, of a tenant, having arrested the farms in a third party's hand, a cautioner

If a cautioner may plead in the creditor's right, without being assigned to the debt? for the tack-duty appeared, and pled preference upon the right of hypothec. Answered, The cautioner cannot plead upon the hypothec, not being assigned thereto by the master. Replied, The master is, *ex bona fide contractus*, bound to lend his name to

the cautioner for security of the rent, and the cautioner has an interest to plead in the master's name, and in his right for preference, that the subject of the master's payment be protected from the tenant's creditors. The Lords found, That the cautioner, not having paid the rent, nor got any assignation thereof from the master, had no right to the hypothec, and therefore preferred the arrester *in hoc statu*. 24. Jan. 1735, Garden.

IT was found, That a cautioner for a factor, who was popish, was free with regard to

Cautioners, how liberated? all the factor's intromissions, after the third act, parl. 1700, declaring papists incapable of any such office. Fount.

28. Feb. 1708, Fraser.

Cautioners entitled to relief.

A TENEMENT being disposed for relief of cautionary, and the bond of relief, not mentioning that the cautioner might enter

Diligence competent to cautioners for relief.

to the possession until he was paid, the Lords found, That it was no title of possession, unless the cautioner would instruct, that he had paid the debt, and

to had purify'd the conditional infestment, or that he was distressed. Fount. 1. Feb. 1687, Montgomery.—A cautioner being distressed, and confirming executor-creditor to the principal debtor; and the relict, as a posterior executrix-creditrrix, competing, and alledging, that he had no right till he paid; and he answering, That he was willing, with the goods confirmed, to pay the debts for which he was bound; the Lords sustained his confirmation upon the clause of relief, provided he produced a right to the debt, or a discharge thereof before extracting. Fount. 7. Feb. 1681, M'Kenzie.—An apprising found null, because led, not by the creditor, but by the cautioner, upon his bond of relief, before he was either distressed, or had made payment. Home, Nov. 1686, Dickson.—A cautioner in a confirmation, having pursued the executors to relieve him of his cautionry, and to find caution for that effect, because they had wasted the goods confirmed, and were *pergentes*; the executors were ordained to compt and reckon upon the goods confirmed, and to instruct how the goods had been employed, before answer to the pursuer's claim of new caution. Dur. 19. Jan. 1627, Thomson.—Found, That a party, suing for an adjudication on a bond of relief, when as yet there was no distress, was well founded in law, tho' it was but a conditional obligation, and *dies incertus*; and therefore allowed the decree of adjudication to be extracted, but to go out with this quality, that it should not take effect till distress. Fount. Falc. 20. Nov. 1685, Burnet.—In a competition between two arresters, the Lords thought, that an illiquid fact was not a ground whereon arrestment could follow, but that, if it was made liquid before forthcoming, the arrestment would stand good; and therefore, one of the parties having paid, and acquired in a debt, for which he had been cautioner for the common debtor (and had his bond of relief) before the competition in the forthcoming; they found that his liquidation was to be retrotracted to validate his arrestment, as much as if the debt had been liquid at the date of the arrestment. Fount. 9. Feb. 1704, Drummond.

A CHARGE of horning was found sufficient distress for

*What distresses
sufficient to en-
title the caution-
ner to relief?*

for a cautioner to ask his relief, altho' nothing further was done thereupon, nor had the cautioner paid the debt. Dur. 28. July 1625, Tenants of Hayning.—The registration of a bond was found sufficient distress, whereupon a cautioner might require his relief against the principal being suspected of being *vergens*. Dur. 26. March 1628, Vans.—The like; Colv. Stevenson.

*Relief, in what
cases it may be
demanded with-
out distress?*

A BOND of relief was found to be the ground of a charge, tho' no distress was produced, it bearing an obligation to pay at a certain term. Gosf. 7. July 1668, Paton.

A PRINCIPAL was found bound to relieve his cautioner, and pay him all annualrents since the time he paid, tho' the bond bore no annualrent; and the clause of relief carried only to relieve of the premises in the bond, without mentioning cost, skaith, damage, interest, &c. Dur. 4. Dec. 1629, Cockpitt.—Altho' bonds of relief carry all cost, skaith, damage, &c. yet the Lords interpreted the same only to extend to the principal and annualrents; so that, altho' a cautioner be denounced, his escheat fall, and his lands be comprised, &c. yet the principal will be only obliged as above. Notwithstanding this, in a case, where the cautioner's lands were comprised for the principal sum, annualrent and penalty, sheriff-fee, &c. on a suit for relief, the Lords ordained the principal to refund to the cautioner, all that he had justly disbursed, and that upon the cautioner's own oath. Auchin. (*Caution*) 19. March 1630, Lundie.—No cautioner can legally claim expences given out by him, after a decree is recovered against him, because they were needless and wilful, so that, being once decerned, he ought to have paid the debt. Fount. 31. Jan. 1678, Mathieson.—A cautioner having paid the debt, in a competition between him and the donatary, to the principal debtor's bastardy, the Lords found, That the penalty of the bond must be restricted to the sum really paid out by the cautioner to the creditor. Bruce, 22. Feb. 1715, Bowles.

A CAU-

A CAUTIONER, against whom sentence had past, and who had thereupon paid, was found to have no relief against the principal, because the principal was not called in that decree, nor was the distress ever intimated to him; and, if he had been called, he had a good plea to make, namely, compensation. Dur. 19. Dec. 1632, Maxwell.

A cautioner paying, and insisting for relief, is liable to all objections competent against the debt.

Cautioner in a Suspension.

AN assignee charging, and the letters being suspended on caution, he having reponed the cedent, and the cedent charging of new, the party obtained suspension without caution, in respect of the first cautioner, who was declared to stand bound to the cedent being retrocessed. Had. 23. Jan. 1620, Kinninmonth.

In a second suspension of the same debt, a new cautioner is not required.

LETTERS being suspended on this reason, That the charger had not performed what he was bound for to the suspender, and the charger having, at discussing, implicated his part, the Lords, nevertheless, suspended the letters *simpliciter quoad* the cautioner; and found, That he ought not to be burdened with the debt, because the suspender had reason to suspend, the charger not having performed his part at the time of raising the suspension. Spot. (*Suspension*) 5. Dec. 1633, Weir.

In what cases is the cautioner assilzied, while the letters are found orderly proceeded against the suspender?

—In a suit against the attester of a cautioner in a suspension, the Lords found, That the pursuer, being under sentence of death when the charge of horning was given, the charge was null, as the debt came under the charger's escheat. This was found relevant to assilzie the cautioner and his attester, altho' that now, at the time of this process against the attester, the charger had got a remission, which being, in effect, a new title acquired from the king, and not being in his person at the time of the charge, and raising the suspension there—

thereof, he had no right to the sum. But the author adds, The Lords were of opinion, that no reason of suspension, suspensive of the debt only, such as arrestment, and the like, could exoner the cautioner, but only such reasons of suspension as did quite extinguish the debt, or were exclusive of the charger's title. Home, March 1682, Falc. 2. Jan. 1683, Somervil.—In a suspension upon a reason of compensation, the charger proposing, and thereafter proving recompensation, the Lords found the letters orderly proceeded against the principal party; but suspended them as to the cautioner, in respect that the ground of recompensation was only made liquid after the suspension. Falc. 27. Nov. Home, Dec. 1685, Moir.—A minor, having suspended his own bond, upon the head of minority and lesion, and, before suspension was got discussed, he becoming major, and then granting a bond of corroboration of the debt, which precluded his own objection; the Lords found the cautioner in the suspension free, seeing the principal was overtaken by his own deed of ratification, subsequent to the suspension, which could not prejudice the cautioner, who was, *in bona fide*, to engage for him. Fount. 5. July 1706, M'Dowal.—A suspended decree being turned into a libel, and a day assigned to the suspender to depone on the verity of the debt; and upon his failing to depone, the letters being found orderly proceeded; the cautioner in the suspension was, notwithstanding, found liable to pay the debt. Fount. Forb. 30. Nov. 1709, Dunbar.—The Lords found, That a charge on a bond of relief, tho' before distress, was noways unwarrantable nor unjust; and therefore, the principal having suspended such a charge, it was found, That the cautioner, and his attester in the suspension, stood bound to the charger. Fount. 4. Feb. 1704, Kennedy.—When a decree, upon a registered bond, is turned into a libel, as being registered in a jurisdiction where the debtor dwelt not, the cautioner, in the suspension, was liberated of course. Fount. 8. Nov. 1692, Schaw.

A CAUTIONER, in a suspension, being charged for the expences modified in the decree of suspension, was assilzied therefrom, in respect he was not expressly bound for the same in the bond of cautionry:

Cautioner in a suspension, how far liable?

tionry: but the Lords recommended to a committee of their number, to draw a *formula* of a bond of cautionry in suspensions, according to the old act of sederunt 1613, observed by Spot. *voce* (*Suspension*) to be the rule in time coming. That cautioners, in suspensions, might be liable, not only for the sum in the charge, but for the expences modified at discussing the suspension. Forb. 30. Nov. 1709, Dunbar. See act of Sederunt, 27. Dec. 1709.

IN a suspension of a decree of pointing the ground; the creditor having obtained decree of suspension; the cautioner, who had enacted himself to pay the bygone annualrents, was, notwithstanding, found only liable to warrant the insectment of annualrent, by giving access to the creditor to point the ground; but that he could not be personally liable for the bygone annualrents, it being a real action, having no personal conclusion against the suspender himself. Dur. 18. Feb. 1623, Blackburn.

A THIRD party, upon appearing for his interest in a suspension, being preferred to the charger, and applying to the Lords to have warrant for letters of horning against the cautioner in the suspension, seeing the bond of cautionry, as usual, was in favors of the charger only; the Lords considering, that the design of the bond of cautionry was, that the sum charged for should be secure, in the event that the same was found due; therefore they granted warrant for letters of horning against the cautioner, for his paying the sums decerned, and made an act of sederunt, That, in time coming, there should be an addition to the style of bonds of cautionry, and that the cautioner should be bound to pay, or perform to the charger, or to any other person found to have best right, in so far as the suspender should be found liable. Dair. 21. Nov. 1717, Bennet, &c. supplicants.

Attester.

ALL the attester is presumed to undertake, is, that the cautioner is holden and repute sufficient; so that if the

the cautioner thereafter become bankrupt, the attester is not liable. Stair, Dirl. 17. Dec. 1667, Paterson.

A man having attested a cautioner, in a bond of presentation of a party under caption, the Lords found, That these obligatory words (*and obliges myself for the same*) which are now commonly subjoin'd to attestations, import more than the cautioner's being habite and repute sufficient at the time of the attestation; and that it also burdens the attester to prove, that he was actually and really solvent at the time. Dalr. 6. Fount. 16. Dec. 1698, Dempster. Yet some years thereafter, in a case existing before the act of sederunt 1709, a party having attested the sufficiency of a cautioner in a suspension, and also added the above-mentioned words, and *I oblige me, my heirs and executors for the same*, the Lords found the attester no further liable, than to prove that the cautioner was holden and repute solvent at the time of his attestation. Forb. 19. Fount. 20. July 1710, Ramsay.

A PERSON engaging to become bound for, and with another antecedently bound, and
Inter decisions. binding accordingly, whereupon he was assigned to the original debt, not intimating his bond of relief, was found not entitled to the septennial prescription in favor of cautioners. Falc. vol. I. p. 1. Sinclair, 9. Nov. 1744.

A CAUTIONER, granting a bond of corroboration with a new cautioner, is bound to relieve him of the whole. Falc. vol. I. p. 117. Merrie, 10. July 1749. The like; Remark. Dec. p. 110. *inter eos*.

A CAUTIONER, in losing arrestment, has not the benefit of discussion. Remark. Dec. p. 77. *inter eos*. The like; Fac. Col. vol. II. p. 435. M'Arthur, 22. July 1760.

THE surety for a messenger, is liable for malversations done to those against whom he is employed. He is liable also in expence of process; and, he is not freed, tho' the commission is not recorded, nor tho' the Lyon be dead at the time of his malversation. Fac. Col. vol. II. p. 216. Grant, 8. July 1758.

A PERSON becoming cautioner for one partner of a company, to relieve the other partners of the company-debts, is not entitled to the benefit of the act

CHARGE TO ENTER HEIR. 225

1695. Fac. Col. vol. III. p. 211. Ewart, &c. 29. July 1762.

CAUTIONERS, when liable in solidum? See Solidum et pro rata.

CAUTIONER, obtaining eases, must communicate. See Debtor and Creditor. Mutual relief among co-cautioners. Ibid.

PROPORTION of this relief. See Solidum et pro rata.

CREDITOR bound to assign on payment. See Debtor and Creditor.

BOUND also to communicate every separate security he has for his debt. Eod. Cannot liberate the principal debtor after imprisonment. Eod.

BENEFIT of discussion. See Discussion.

SENTENCE against the principal, if res judicata against the cautioner? See Res inter alios.

STRANGERS, sued here, must find caution judicio liti. See Forum competens.

CHARGE to ENTER HEIR.

REDUCTIONS, declarators, and other real actions, that have no personal conclusion against the heir, require no general charge to enter heir, these being only necessary in order to make the heir personally liable. Stair, 26. June 1667, Dewar.—Therefore, it is not necessary in a poinding of the ground. Stair, 2. Jan. 1667, Oliphant.—Nor in a process, for the avail of marriage, pursued against the ground. Dur. 14. Nov. 1635, Dickson.—For the same reason, probation of a tenor, being a declaratory action, was sustained upon calling the apparent heir, without charging him to enter. Stair, 12. Dec. 1672, Brodie.—An order of redemption may be used against an apparent heir, without necessity of a charge to enter heir. Dur. 11. Dec. 1638, Finlayson.

A PARTY, having first given a general charge to enter heir, and thereafter, but before sentence, a special charge to enter to some particular lands; the Lords reduced the charge, comprising, *ope exceptionis*, and with-

out

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out necessity of reduction, because of the inviolable form. That a general charge must precede, and next a sentence against the party, which must be succeeded by a special charge, in order to a comprising. Dur. 15. Feb. 1627, Cassillis.—But it was found to be no objection, That the special charge was raised and executed before extracting the decree of constitution, being after the decretum. 11. Dec. 1738. Creditors of Catrine.

THE Lords sustained this objection against an adjudication, That the lands were not filled up in the special charge, at the time of pronouncing and extracting the decree of adjudication, and found the same relevant to annul the adjudication *in totum*. 1. Dec. 1738. Creditors of Catrine.

AN adjudication, without a special charge, was sustained in a competition, tho' the debtor

*In what cases
a special charge
not necessary?*

was not infest, he being served heir in special; and also had charged the superior to infest him. Dur. 25. Nov. 1629,

Dickson.—In a competition anent a

right of reversion, between a creditor, who had adjudged the same from the apparent heir of the reverser, and a posterior heir, passing by the apparent heir, and connecting his title by a general service to the reverser, it was objected against the adjudication, That it was null, the apparent heir not having been charged in special to enter heir to the subject in question. Answered, The apparent heir was charged in general to enter, which being suppletory of a general service, was a sufficient foundation of the adjudication, as to all rights that can be carried by a general service. Replied, A general charge is intended to supply a passive title only, for such is the very style of the charge, but does not supply either a general or special service; a special charge is necessary, for that end, to enter heir to lands and others, where the debtor died infest, this being a special charge, properly so called; and supplying the want of a special service; or to enter heir to heritable rights, where the debtor died not infest, which is termed, a general special charge, and which last kind of charge, and that alone, supplies the want of a general service. The Lords found the adjudication null. 10. July 1737, Menro.

CITATION

C I T A T I O N.

PROCESS is not sustained upon any debt of the deceased's, unless the whole heirs portioners be called.

Stair, 18. Jan. 1672, Master of Salton.

—Yet the Lords sustained process against one of more heirs portioners, al-

tho' the representatives of the others were not called.

Newb. 23. June 1666, Arbuthnot.

ARELICT, transacting with her husband's heirs, who were mean obscure persons, and, for a gratuity, getting disposition to his whole succession, but giving back-bonds to the heirs, obliging herself to relieve them of all debts her husband was owing, and of all damage and expence they could incur that way; and she being purchased by a creditor of the husband's upon the passive titles, *as emprix hereditatis*, but alledging, That the heirs must be called to whom she granted the back-bond, since they might have instructions of payment, and other defences, which she knew nothing of; the Lords sustained process against her, without necessity of calling the heirs of line.

Fount. Forb. 3. July 1711, Walwood.

IT is sufficient, in an improbation, to summon a minor personally, and his tutors generally, at

the market-crofs. Had. 1. Feb. 1610,

Alphington.—A decree, pronounced against a pupil, was reduced, because his tutors and curators were not called for

their interest, altho' it was notour he

had none. Mait. 6. March 1573, Crichton.—A father-

administrator, need not be specially cited, it is sufficient that tutors and curators are cited in general. Dur. 8.

March 1626, Kinghorn.—A wakening against tutors, be-

ing only executed against one, and not against the other co-tutors, who, it was alledged, must be called to the

wakening, as well as to the principal summons; the Lords allowed the pursuer to cite them, *incidenter cum*

processu, provided they were cited any time before ad-

judging of the cause. Fount. 13. Jan. 1686, Lockhart.

—In a removing against a father and his son, the son be-

ing

In a process on the passive titles, who must be cited?

In a process against a minor, who must be cited?

ing minor, and the father summoned as administrator to him, this was found sufficient, tho' the tutors and curators were neither generally nor specially summoned, and that he had other curators. Dur. 17. July 1639, Lie.—The Lords turned a decree into a libel, it being against a minor, and his curators not cited with him *in initio litis*, upon two diets, but only cited, *cum processu*, by virtue of an incident, to compare upon two days warning. Forb. 28. Dec. 1705, Gavin.—Yet a minor being summoned, without citation of his tutors and curators, the Lords refused to call the summons, but assigned a day to the minor to get himself authorized, with tutors or curators. Had. 20. Feb. 1624, Fairney.—Found, there was no necessity to warn the curators of a woman minor, she being married, and her husband summoned. Hope, (*Minor*) 2. July 1622, French.—A suspension against a minor was sustained, altho' it was executed against the charger only, and not against his tutors and curators, neither was there any warrant in the suspension to summon them. Dur. 1. March 1627. Burgeses of Glasgow.

TUTORS and curators need not be certiorate in extrajudicial acts, such as warnings, but must be called in the summons of removing following thereupon. Dur. 12. July 1628, Bennet.—In the declarator of the double avail of a marriage, it was found, that requisition and offer of a party, may be made to a minor without warning his curators. Dur. 3. Had. 4. July 1622, French.—The like, as to a requisition, at the instance of a wadsetter. Dur. 6. March 1639, Unquhart.—In a declarator of redemption against a minor, the Lords found, That the tutors and curators need not generally be warned in the instrument of premonition, since they were specially and *nomination* warned. Dur. Hope, (*Wadset*) 19. Dec. 1629, Carnoulie.—Found, It was sufficient to arrest in a minor's hands, without necessity to execute the arrestment against his tutors or curators, either personally, or by leaving a copy at the cross, tho' these ought to be cited in the forthcoming: and here a posterior arrester, who had arrested

In extrajudicial steps against minors, who must be certiorate?

rested in the curators hands, was competing. *Harc.*
Arrestment) Nov. 1687, Robertson.

A TUTOR's factor being, by contract with the con-
 stituent, obliged to do all for the pupil
 that the tutor himself was bound to by *Actio directa*
 law; the Lords found, That the tutor *tutela*.
 needed not be convened in a pro-

cess of compt and reckoning at the pupil's instance. *Dur.*

4. July 1629, Slewman.—The Lords sustained action
 of compt and reckoning against the accepting tutors no-
 minated, without calling the rest, who did not accept or
 act. *Forb.* 23. June 1705, Murrays.—But in a
 suit against a tutor's heirs, they would not sustain pro-
 cess, till the co-tutors were called; for the heirs could
 not know the administration, or how to accompt. *Stair*,
 Dec. 1668, Seton.—Found, That a minor ought to
 call all his whole tutors or curators, either at the beginning,
 or *cum processu*, to the effect, that the defences of every
 one, may be communicated to all, tho' every one may
 be decerned *in solidum*. *Harc.* (*Tutors*) March 1684,
 Napier. This was adhered to, as to the representatives
 of dead tutors. 2. Dec. 1684. And, the like was de-
 cerned, Jan. 1685; Dalgarno.

A COMMISSARY cannot decern an executor-dative,
ad omiffa, unless the principal executor

be first cited thereto. *Dur.* 12. March *In confirma-*
 1631, Duff. *Dur.* 14. Feb. 1622, *tions*.

Rayn. *Forb.* 18. July 1706, Lees.—

Yet, a testament-dative, *ad omiffa*, was sustained, the
 principal executors, by the edict, being generally cited
 to hear executors, *ad omiffa*, decerned, tho' there was

no personal citation. *Dur.* 28. June 1623, White —

but in processes against debtors, after confirmation, the

principal executors need not be called. *Dur.* 5. Dec.

1627.

IN an action against executors, the exception, That

the heir of one of the co-executors was

not called (the office being indivisible) *Process against*

was found relevant, unless the pursuer *executors*.

should alledge, that the executors con-

tinued, had intromitted with as much as would pay the

pursuer. *Spotif.* (*Execution*) *Dur.* 18. July 1628, Pea-

ck.—Formerly, it had been found, That where one

of two executors is dead, the other may be sued as such, without calling the heirs or executors of the other. Mait. 26. Feb. 1567, Lovat.

AN executrix, when pursued, founded her defence upon a decree of exoneration; to

Exoneration. which the pursuer answered, That he was not called thereto, and that the executrix knew of his debt, having paid part of it. This was repelled, and the defence, on the exoneration, sustained. Dur. 16. July 1629, Tailzifer.

A PARTY having fully discuss'd an executor, and thereafter insisting against the cautioner, in which process, the executor was also called for his interest; but he deceasing, after some steps taken in the cause; the Lords found no necessity to summon his representatives, or to transfer the process, the executor being no necessary party, as being discuss'd before. Dur. 5. Dec. 1623, Rocheill.

Process against a woman vestita viro. FOUND there was no process against a woman, married after executing the principal summons, because her husband was not cited for his interest in the second summons of continuation, which he

might have been, upon supplication to the Lords to grant warrant for that effect. Dur. penult. June 1627, Baillie.—A woman, clothed with a husband, having committed ejection, and thereafter being sued for the same in her widowhood; the Lords sustained the process against her, without finding any necessity to summon the heirs and executors of her deceased husband (altho' he himself behoved to have been called, if the action had been pursued against her in his lifetime) seeing the fact was only pursued against the woman herself as committer, *et noxa caput sequitur*. Dur. 18. July 1622, Caldwell.

MAGISTRATES being sued for not taking a rebel, no necessity was found to summon

Process upon delinquencies. the rebel himself to this suit, where in the magistrate is convened *ex propria culpa*, the rebel being decerned before; and because here the principal debtor had no interest, as in a forthcoming he has. Dur. 25. June 1629,

1629, Ross.—The like; a bailie being charged to take a rebel, and disobeying, a process was led against him for the sum. Dur. 22. Nov. 1621, Slater.—An inquest may be sued for error, tho' some of them be absent. Ersk. July 1573, Ruthven.—Process may go on against any one of an inquest for error, without calling the rest. Mait. 3. August 1554, The Queen.

A SPECIAL legator cannot convene a debtor, without calling the executors of the deceased, because they may alledge reasons why the legacy ought not to be paid, as that, *debita excedunt bona*, &c. *Process at a legator's instance.* Dur. 10. March 1627, Forrester. But he need not call the other legators. Dur. 31. Jan. 1639, Dundas.

A COMPRISER of the reversion, redeeming the lands from the wadsetter, needs not call the reverser nor his heirs. Dur. 17. Dec. 1629, Carnhouse. *Process at an assignee's instance.*

CITING of tenants is not sufficient, where the master is most concerned, as in obtaining a decree of locality. *Process of locality.* Gilm. 16. Jan. 1663, Roxburgh.

IN an action for a pension against the chamberlain of a person of quality, the Lords found, That there was no need to summon the master for the time, nor any to represent him, notwithstanding his chamberlain was summoned to pay the pension. *Process for a pension.* Spotis. (Pension) 20. Jan. 1627, Wemyss.

IN a declarator at the instance of an appriser, for declaring another's prior apprising to have been extinct and satisfied within the legal, by his, and his author's intromission; the defender alledged no process, in so far as concerned the author's intromission, in respect authors are not called. Answered, The defender's apprising not being quarrelled by reduction or improbation, to take away the right, as not good or sufficient, but only by declarator, as being satisfied within the legal; the pursuer needed not to call authors, but if the defender pleased, he might cite them, *cum processu*, or intimate the action to them.

The Lords repelled the alledgeance, in respect of the answer. *Harc. (Comprising)* Nov. 1683, Reidsword.

IN a declarator of bastardy, it was found sufficient to call the officers of state, and not the deceased's nearest of kin, because presumed that he has none. *Hadl.* 18. Jan. 1612, Clark.—The like; *Hope (Bastard)* 10. Jan. 1618, Hirpet.—In a declarator of bastardy, a general citation, at the market-cross, of all parties having interest, is sufficient, unless particular persons be named, who would succeed, if the deceased was not proven bastard, and, in that case, these persons must be cited *sum processu*. *Stair*, 11. Dec. 1679, Somervell.

DECLARATOR of property may be sued against the feuer of the lands, without calling the superior. *Dur.* 21. Dec. 1633, *Wemyss*.—In a declarator, That the sheriff of Inverness had a right to fish three days in the water of Ness, no necessity was found to call the town, or any, but the possessors. *Fount.* 8. Nov. 1677, *Murray*.

IN an action against a wadsetter of a part of lands, that had a moss in common, for restraining the wadsetter's interest in the said common, the Lords sustained process against the wadsetter, tho' the grantor was not called: But they declared, That what should be done in this process, should not prejudice him. *Dur. Had. penult.* Feb. 1623, *Irvine*.—In a declarator of property, libelling certain marches and bounds to the lands, which in effect terminated in a perambulation, or fixing of the marches, it was found sufficient to call him who had a disposition to the adjacent lands, tho' he was not infest; and on his being called, that it was unnecessary to call the disponent who stood in the real right. *Gilm.* 3. *Stair*, 8. Jan. 1663, *Nichol*.—A decree of perambulation, pronounced by the Sheriff, was sustained against Feuers, tho' the superior was not called, the Lords declaring, That if the lands should fall in the superior's hand by recognition, non-entry, or otherwise, the decree could not prejudice him. *Stair*, 8. Feb. 1662, *Torphichen*. *Gilm.* Feb. 1662, *Livingston*.

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TENANTS

TENANTS being convened, for certain servitudes, alledged due out of the lands they laboured, this dilator, That their master was not summoned (without which no servitude could be constitute upon the lands) was sustained, tho' not proponed for the defenders, but by their master comparing, uncalled, for his own interest. Dur. Spot. (*Summons*) 9. Feb. 1628, Wardis.

FOUND, that a person to whom a reversion is given, needs not warn the present possessor, but only him who granted the reversion, or his heirs. Col. Jan. 1586, *Declarator of redemption.*

Hog. Had. 22. Nov. 1610, Sanquhar.

—There is no necessity to make premonition to any, except to the heritable possessor. But, in the summons of declarator, upon the order, not only the present heritable possessor, but also the apparent heir of the first granter of the reversion must be summoned; and altho' the lands annalized have past thro' never so many hands, yet the redeemer need not summon any but these two. Dur. Spotif. (*Redemption*) 9. July 1630, Fisher.

This exception against an order of redemption was admitted, viz. That the person from whom the lands were craved to be redeemed, was but liferenter by reservation, and his son, the heir, was not called. Sinc. 23. May 1542; Ramsay.—A person having comprised lands from a wadsetter, and charged the reverser to receive him as vassal, and the charge being suspended, and litis-contestation made in that process, long before the order of redemption, so that the reverser needed not mistake him; yet the Lords found no necessity to warn this compriser, but only the wadsetter's heir. Spotif. (*Redemption*) 20. March 1629; Buccleugh.—In a declarator of redemption, the Lords found, That it was not sufficient to call the heir of tailzie, or him who granted the reversion, altho' he was infest, and in possession, but that the heirs of line, as necessary persons, ought also to be summoned. Dur. 18. March 1628, Cathcart.

IN a declarator of a dead man's escheat, not only the wife and children must be called, but the heir, because of his heirship goods. *Declarator of escheat.* Had. 8. June 1610, Muschet. ult. May 1610; Gibson.—He who seeks declara-

tor of the escheat of a deceased, should summon the heir, and haill children of the deceased, and if he omit any of them, he will get no process, unless the deceased had executors confirmed; in which case, it was found sufficient to summon the heir and executors. Had. 15. Jan. 1611, Veitch.—Found, That in a general declarator of a deceased's escheat, all the nearest of kin, of the same degree, who had interest in the executry, ought to be called, and that it was not enough to call the relict, who had right, in law, to the half, there being no children, because some of the nearest of kin might produce a discharge of the debt, the ground of the homing, which would exclude the escheat as to any part of the goods: But the Lords allowed them to be cited *cum processu*. Harc. (*Escheat*) Dec. 1682, Aberdeen.—In a special declarator, the Lords found, That there was no necessity to summon the children of the deceased rebel, because a general declarator was obtained against him. Had, Hope, (*Declarator*) 2. Feb. 1611, Fraser. 12. Nov. 1612, Balfour. Dur. 21. Nov. 1626, Seton of Meldrum supplicant.—The heirs and executors of a deceased rebel, must be called to a special declarator; but if they concur without citation, it will be sufficient. Had. 7. Dec. 1609, Johnston.—A donatar, having obtained a general declarator, thereafter calling a debtor to the rebel, to make arrested goods forthcoming, need not summon the rebel, because the preceding declarator has transferred the rebel's whole right in the person of the donatar. Had. 13. Jan. 1610, Preston.—The donatar to a rebel's liferent, having obtained a general declarator, the Lords found, That he may warn tenants to remove without necessity of calling the rebel. Had.

Feb. 1603, Watson.—In a declarator of escheat, it was objected, That all parties, having interest, were not cited at the market-cross, conform to the warrant of the letters; which, however, was repelled, in respect that this was but *stylus curie*, long in desuetude; it being enough that the rebel is cited, and none can be prejudged who are not cited, and any that pleases may appear for his interest. Stair, 27. June 1666, Mason.

Declarator of non-entry.

A DECREE of declarator of non-entry, was found null, because, it being libelled, that it fell by the death of the last

last year, his heir of line was not called. Fount. 15. Dec. 1686; and 12. Jan. 1687, Hamilton.—In a declarator of non-entry, the Lords found, That the superior needed to call none but his own immediate vassal, and having obtained decree against him, that he might thereafter get his sub-vassal removed, altho' he had received the feu-duty from him, and had not called him in the declarator of non-entry. Had. (*Non-entry*) 9. June 1610, Wedderburn.—In a declarator of non-entry, it was alledged for the defender, That the pursuer must condescend how long the lands have been in non-entry, and by whose death, and must cite the apparent heir of the deceased *in initio litis*, as the proper contradictor, the defender being a singular successor. Answered, The pursuer being a singular successor to the superiority, he cannot know who were the vassals that died last vest and seased, which the defender may know by the writs; and if he will condescend upon the apparent heirs of the vassal last in seft, the pursuer will call them *cum processu*, and any superior may claim the retour-duties for 39 years back, unless the vassals can instruct how long the lands were full. The Lords sustained the process, unless the defender would condescend on those who had represented the persons last in seft, to the effect that the pursuer might cite them *cum processu*. Harc. (*Non-entry*) Feb. 1683, Queenberry.

THE Lords found it not necessary, in a process of recognition, to call the parties in whose favor the alienation was made, altho' *Of recognition. vel maxime res eorum agebatur.* Colv.

March 1584, King's advocate.

IN a declarator, for regrefs to excambed lands, because of eviction of the lands given in excambion, it is only necessary to *Regrefs upon cite the party, or his heirs, with whom excambed lands. the excambion was made, and the present heritable proprietor of the excambed lands, but no need of citing his intermediate authors.* Dur. 2: July 1629, Wardis.

IN the reduction of a tack, set by a kirkman, without consent of the patron, which tack was assigned to a third party, the Lords found no process, because only the

In simple reductions of voluntary rights.

the assignee, and not the cedent, was called. Spotis. (*Assignment*) Dur. 20. March 1630, Murray.—In a reduction of a vassal's infestment of his lands, there is no necessity to summon the vassals superior. Hope, (*Reduction*) 26. July 1613, Douglas. —In reduction of a bond granted in minority, if the assignation be intimated, the assignee must be cited, *inter annos utiles*, and not the cedent. Stair, 2. July 1667, Blantyre.—In a reduction of alienation of lands, at a map's instance, which, with consent of curators, he had made when minor, the curators need not be called, tho' they gave their own warrandice against reduction. Dur. 7. March 1637, Vernock.

A DECREE being obtained against a minor, as heir served to his father, the minor obtained, afterwards, reduction of his retour, and thereupon intended reduction of the decree. It was objected, That the reduction of the retour could

be no foundation to reduce the decree, because the obtainer of the decree was not cited therein. It was answered, That in reduction of retours, none need to be called but the judge, clerk, and inquest. 2d0. The decree was obtained against the minor when he was but twelve years of age, and never charged upon; so that when the reduction of the retour was intended, the minor neither knew, nor was obliged to know of any decree against him. The objection was repelled. Stair, 24. July 1661, Mitchels.—In a reduction of a decree of exoneration, it was alledged by the executor, That all parties having interest were not called, viz. the creditors and legators, who were concerned in the event of the reduction; for if their sums and discharges were not allowed, according to the exoneration, the defender behoved to return upon them for payment. The Lords found no necessity to call the creditors and legators, but that the defender might intimate the plea to them. Stair, Newb. 11. Jan. 1663, Arnot.

THE Lords sustained process, in a reduction and improbation of a real right, without finding any necessity for the pursuer to call the defender's author, in respect the said author was not liable to the defender.

In reductions and improbations.

defender in any warrandice, not even from fact and deed, and so had no manner of interest in the cause. Forb. 18. Dec. 1708, Erskine. The like; Stair, Gost. 14. July 1671, Dunbar.—It being alledged by the defender in an improbation, That no certification could pass against writs granted to his authors, unless the authors, immediate and mediate, were called; it was answered for the pursuer, It is enough to call the immediate, who may intimate to the mediate authors as they find themselves concerned. Replied, The mediate authors ought also to be called, because they are liable in warrandice. The Lords found, That all authors should be called by the pursuer, as they are condescended on by the defender, who is to give his oath of calumny, that the persons in the condescendence are authors, and liable in warrandice; and if the pursuer will not be at the pains to cite old authors, he may pass from the rights made to or by them, and restrict the libel. Harc. (*Improbation*) Nov. 1684, Lord Advocate. Here was a condescendence of near twenty mediate authors, and this decision seems to render improbations tedious and chargeable to the pursuers.—In an improbation, the evidents made to the defender's authors being called for, it was found, That it was not necessary to call the apparent heirs of these authors, unless the defender would specially condescend who the apparent heirs were. Dur. ult. Jan. 1627, Lauriston.—An apparent heir, being called in a reduction and improbation of a right to lands, granted to one of his predecessors: this dilator proponed by him was sustained, viz. That he was denuded of the lands in favor of another, who now stands inest, and who is not called, altho' the right, by the apparent heir, to that person, was upon a singular title, and had no dependence on the right sought to be improven. Dur. 15. March 1627, Earl of Kinghorn.—Found, that subvassals, being in possession, ought to be called in an improbation against the vassal their author, because they could not be unknown, being heritable possessors; but as to tenants possessing lands by tacks, or heritors their own tiends by sub-tacks; their Lordships thought, that it could not so well be known that they had right, and so that they were not parties necessary to be called. Dirk.

Dirl. 23. Jan. 1668, Town of Glasgow.—The clerk register found to be a necessary party to be summoned, where the king's writs, in his keeping, are called for to be reduced. Had. 26. Nov. 1622, Earl of Mar.—In an improbation of a comprising, the clerk thereon was found not necessary to be summoned, altho' the warrants thereof were called for; seeing he was not a public person, but chosen at the pleasure of the comprising, who chooses his clerk upon his own hazard. Dur. 28. June 1628, Henderson.—In an improbation, the Lords found, that services cannot be reduced for non-production, where only the party is called in the process, and neither the director of the chancery, who is presumed to have the service, and to keep the same for the warrant of the retour, nor the judge and clerk, before whom the service was deduced, is called. Dur. 17. Feb. 1624, Lord Elphinstone.—Certification was refused in an improbation, at the instance of a superior against vassals, of writs granted to their predecessors, until the predecessor's heir of line was called, altho' the heir male was called, and had acquired the heir of line's right; but it would have been granted, if the suit had been restricted to such writs as were conceived in favor of the predecessor, and his heir male. Dur. 11. Jan. 1628, Earl of Mar.

A DEFENDER, in a removing, having founded upon a tack from a rentaller, who was not

Maills and duties, and removing.

warned, and the pursuer having replied upon conditions in the rental, by which it would appear to be expired;

the Lords found no process till the rentaller was called. Dur. 22. March 1627, Lady Niddale.—But where the rental bore an express prohibition to assign or sublet, it was not found necessary to call the rentaller. Dur. 15. July 1628, Lady Maxwell.—The donatar to a ward calling the tenants to make payment to him of the duties of their lands, need not call their master; for as a ward needs no declarator, so, when the donatar calls for the maills, there is no necessity for his knowing any but the actual possessors of the lands. Had. 22. Feb. 1612, Skeen.—To found an action of maills and duties against tenants, it is not necessary to call the master; in removings, indeed, the heritor should be called, because

because thereby his possession is to be inverted: but in baills and duties, the tenants may suspend on double poinding, or if a tenant collude with the pursuer, the master may use the tenant's name to suspend; but double poinding can have no place in removings. Dur. 5. Feb. 1630, Dur. 13. Nov. 1634, Mu-
 tie. Stair, 10. June 1665, Home:—The like; Fount. 8. Jan. 1702, Haliburton.—An exception sustained in removing, that the defenders were tenants to a third party infest in the lands, who was not warned, and they were found not obliged to say or instruct that he was lawfully infest, because the master only could be obliged to dispute upon the lawfulness of his right. Dur. 7. Dec. 1627, Lord Bamf.—In a removing, at the instance of a lady tercer kenn'd, there was found no necessity to call a compriser from her deceased husband, tho' infest, and in possession of the rents. Dur. 18. March 1630; Lady Maxwell. Far less the heir of her husband, seeing one is not bound to cite his own author. Spot. (*Removing*) 26. July 1627, Boyn.—In a removing, there was found no process, all parties having interest not being called, viz. the defender's wife, in respect that he possessed only by his *jus mariti*, in her right. Stair 15. July 1665, Johnston.—In a process for removing, it was sustained, as an absolvitor to the tenants, that the liferenter, whose tenants they were, had not been warned or called, she being alive at the time of the warning, tho' dying before the term. Stair, 30. June 1669, Agnew —In a removing, it was not sustained as a defence, That the defenders were tenants to another, and he not called, unless they could condescend upon their master's right, which might defend him and them. Stair, 9. Dec. 1664. Inglis.—And the tenants having condescended upon their master's infestment, the condescendence was not sustained, unless they would farther alledge, that the infestment was confirmed by the king, being of kirk-lands. Dur. 9. Dec. 1626, Buccleugh. 14. Feb. 1633, Lochmoir.—The Lords found, That a first compriser, in possession of the rents, having charged the superior, but not infest, need not be called in a removing at the instance of a second compriser infest. Gilm. 15. Dec. 1664, Inglis.

A MAN,

A MAN, pursuing possessors of lands, for abstracting their corns from the pursuer's mill, altho' he called not the heritor, became the tenants are called, *super facto proprio*, will get decree, but that decree, given against the tenant, will not prejudice the master of his defence or right. Had. 1. Dec. 1610, Fenton. No process was found against tenants for abstracted multures, where their master, the heritor, was not summoned, altho' it was alledged, That they were in continual use of bringing their corns to the pursuer's mill, as thirled thereto, and paying the accustomed dues of thirlage, past memory of man. Spot. (*Multures*) Hope, 20. March 1628.

IN a process, at an assignee's instance, for payment, it was found relevant, for a prior arrest. *Process of* er to appear in the process, and plead *forthcoming*. his preference, without calling the common debtor. Stair, 5. June 1666,

Nisbet.—An arrester, pursuing a forthcoming, and referring the verity of the debt arrested, to the oath of the party, in whose hands the arrestment is laid, and summoning him to a day to depone, must also summon the original debtor to the same day; or, if that is neglected, the oath may be taken to lie *in retentis*, but no decree can go out, till the principal debtor be summoned, and the days of the summons run. Dur. 17. March 1637, Stewart.—In an action to make forthcoming a moveable sum, pursued after the common debtor's decease, it was found, That the heir is not *legitimus contradictor*, to be called as defender, but that the executor ought to be called. Fount. 20. Jan. 1681, Maxwell.

A COMPRISING was sustained, altho' the wife was not called thereto, seeing there was no *Adjudication*. right comprised from her, but only what right her husband had thereto, *jure mariti*. Dur. 15. June 1624, Finlayson's wife.—In an adjudication against a vassal, the superior need not be called. Fount. 16. July 1678, Courty.

IN a reduction *ex capite inhibitionis*, there was found no process, till the person inhibited was called, the defender's author, and who was bound to him in warrandice. Stair, Newb. 31. Jan. 1665, Borthwick. The like; Hope (*Inhibition*) 10. July 1617, Brown.

FOUND,

FOUND, That in a poinding of the ground, it was sufficient to call the defender, being in-
 fest, altho' under reversion, and that
 there was no necessity to convene any
 other heritor, because, thus it would be
 as reasonable to call the heritor's author; nor had the
 pursuer any necessity to know of the reversion, because
 it might be discharged, &c. But that other person com-
 appearing, was allowed to do so for his interest. Dur. 1.
 Feb. 1631, Cunningham.—Yet in a poinding of the
 ground, no process was found till the party was called,
 who, at the time of the summons, stood heritably in-
 fest in the lands; altho' the pursuer replied, That there was
 no necessity to summon him, seeing his heritable in-
 festment was but a base one, granted to be holden of the
 giver. Dur. 1. Jan. 1636, Oliphant.—The heritor
 must be called, not the superior. Dur. 1. Jan. 1636,
 Oliphant.—A compriser, not in-dest, need not be called.
 Had. 19. Dec. 1609, Spotiswood.

*Poinding of
the ground.*

IN a process of sale, at the instance of a creditor, of
 his debtor's estate, upon the head of
 bankruptcy, the Lords found no pro-
 cess, in respect there was no edictal
 citation, nor any warrant in the sum-
 mons for such citation, as the act of sederunt, 23. Nov.
 1711, directs. Here it was pled, What the act of sede-
 runt enjoins is not of necessity, but of expediency, which
 the raiser of the sale may prosecute, or not, as he thinks
 fit; and that if all the real and personal creditors be ci-
 ted personally, or at their dwelling-houses, in the com-
 mon course of diligence, the edictal citation is superflua-
 nous. 28. June, 1727, Marchmont.

*Process of
sale.*

IN an action of exhibition, and delivery of the court
 books of a sheriffdom, at the instance
 of the sheriff, it was found not necessa-
 ry to call the heir or executors of the
 sheriff-clerk, but only the havers; because these books
 are public, and pertain to the judge, and not to the de-
 ceased's representatives. Had. 29. Nov. 1611. San-
 guhar.—In an exhibition of some heritable writs, at the
 instance of an heir, against his father's relict, and some
 other persons as havers, the Lords found, That the debt-
 ors had no occasion to be summoned, as there was no
 execution

Exhibition.

execution craved against them. Dur. 6. Dec. 1622, Fotheringham.—But the relict of a debtor in a bond, being sued to exhibit the same, and, in that process, making voluntary exhibition thereof; the Lords found no process, till some person was summoned to represent the deceased debtor, as it was not libelled, that the bond was the pursuer's evident, or was ever delivered to him, but was produced now, after the debtor's decease, by his relict, from among her husband's writs; and this was found, being proponed by a creditor. Dur. 17. March 1636, Reid.—A compriser cannot seek for production of any writs of the lands comprised, nor the same to be copied to him, without calling the debtor to the pursuit. Dur. 10. March 1627, Dick.

IN case of a party's craving an incident for recovering of writs called for to be improved, the Lords found, That the Lord Advocate, as being a necessary party, must be summoned; because he, being a party in the principal summons, could not be left out in the incident. Spot. (*Incident Diligence*) Dur. 10. Feb. 1624, Yester, 12. Feb. 1624, Mar.

A TACK of teinds being set to a man, and to three of his heirs *successive*, and then for 19 years after, and the commission having thereafter granted him a decree of prorogation for 202 years after the expiration of his tack; and the tacksmen's representatives suing an heritor for his teinds, but producing only the decree of prorogation of the tack, and a transumpt of the said tack, to which the defender's authors were not called; the Lords found the decree of prorogation and transumpt not sufficient, unless the tack had been expired, and the years of prorogation commenced, tho' these would be good adminicles, if the tenor of the tack was to be proved. Fount. 13. Dec. 1699, Bailie Telfer.—A transumpt was found not to instruct a pursuer's title, when the process of transumpt was raised *pendente lite principali*, and the defender not called thereto. Mait. 20. July 1552, Tutor of Pitcur.—The contrary found in the case of a sasine, in which there is no party directly or immediately concerned to be called. Dur. 15. Feb. 1623, Hope-Pringle. Dur. 17. June 1636, Wigton.

Wigton. In transuming of charters or sasines of lands, it is necessary to call the superiors thereof. Altho' the like custom has not been in transuming of charters and sasines of lands holden of the king in time past, yet the like reasoning militates for his majesty's interest, and the Lords will proceed so in time coming. Had. 19. June 1612, Dunwedie.

ACTION of proving the tenor cannot proceed against the heir of the deceased, without calling the executors. Dur. 5. *Proving the March 1628, Hammermen of Glas- tenor.* grow.

REPRESENTATIVES of a defender, tho' foreigners, may be called by an edictal citation. Home, p. 405. Dundas, 13. *Later decisions.* Dec. 1743.

THE Earl of Kintore, Forbes of Craigievar, and others, had long enjoyed, in form of a society, a conjunct possession of fishing salmon in the river Don, by means of cruives erected in that river, when they were attacked by Lord Forbes, and other heritors, upon the upper part of the river, concluding in their process, That the defenders should demolish their cruives, and pay damages, &c. A no-process was objected upon the act 6th, Parl. 1672, to wit, that, in the execution against William Brebner, one of the defenders, none of the other defenders are mentioned. Answered, That neither the statute, nor any practice hitherto observed, requires, that where a summons is executed at different times, against several defenders, every execution ought to recite the names of the whole defenders, witness processes of ranking and sale, improbations against creditors, processes against debtors, and others of the like nature; where the practice is to name only that single defender who is cited in the execution. The Lords sustained the objection, upon this ground, That the defenders were all connected together, and that it was necessary to call every one of them in the process. But it was the opinion of the court, that in a process against several defenders, having no connection with each other, the objection is not good; for there, tho' all the parties be called in one summons, yet the case is the same, as if there were as many different processes as

there are different defenders, in which case there may be an execution against each of the defenders, separately; and the bringing them all into one summons makes no difference as to this point. — In this cause the Lords were of opinion, tho' they had no occasion to give judgment, That sustaining the objection, of all parties having interest not being called, must have a further effect, than barely to stilt process till the party be brought into the field, by a new process, to be conjoined with the former; that it must have the effect to cast the process altogether, leaving the pursuer to bring a more regular process. And this seems to be agreeable to the forms of the court: For, if a party be not bound to answer, in respect that all parties having interest are not called, nothing remains, but that he be dismissed from attending the court. Rem. Dec. p. 14. Forbes, &c. 10. Feb. 1748.

CITATION cum processu. See Quod ab initio nullum.

AS to places where citation must be used, and the nullities thereof. See Execution.

CLANDESTINE MARRIAGE.

A LANDED Gentleman, being sued by the procurator of the jurisdiction where he lived, for the fine of his clandestine marriage, upon the act of parl. 1671, the Lords, in an advocacy of the cause, found, That the judge and his fiscal had no right to this fine, in being a clandestine marriage within the kingdom, in which case, the act appoints the fine entirely to belong to the poor of the parish; yet considering, that if there were no reward, there would be no pursuer, they found, That the fiscal ought to have all his expenses out of the first and readiest of the fine; but had no respect to a defence, founded on payment already made to the minister of the parish, nor to his discharge produced; and found the defender liable in the fine. Found 7. Dec. 1705; Procurator fiscal of Annandale.

A WIDOW, suing for her terce, and the act of parl. 1671, against clandestine marriages, being objected to her, whereby the woman is to lose her terce; the

Lords

Lords, on perusal of the act rescissory in 1690, did find, that the aforesaid act 1672, was thereby totally rescinded, and so repelled the objection, tho' it appears, that no more was intended, but only the abolishing of the act, in so far as it was inconsistent with presbyterian government, and the present establishment, which that clause of losing the *jus relicta* was not. Fount. 11. Dec. 1705, Carruthers.

CLARE CONSTAT.

A CHARTER, granted by a superior, to the son of the apparent heir of the last vassal, with the consent of the father, and investment thereon, are not sufficient to vest the feudal-right of the lands, even where the apparent heir, contented, had also a right by a disposition, with a procuratory and precept from the last heir invest. Fac. Col. vol. I. p. 22. Landales, June 1752.

CLAU S E, &c.

FOUND, that the clause, *cum communi pastura*, implies no more than liberty to pasture on his own property, but not on any neighbouring common, unless the clause was *in verbis dispositivis*, the said clause being only inserted for forms sake, and generally to be found in all charters. Colv. Feb. 1785, Dundas.

THE two halves of a barony being disposed, at different times, to two different persons, in a mutual declarator, touching a moss belonging to the barony, the Lords found, That the moss belonged to the last disponee, seeing the first disposition bore only *cum moris et marefisis* in the tenenda's, but did not mention in the dispositive clause. Dirl. 25. Jan. 1668, Keith.

IN a question, whether the clause, *cum piscationibus*, did include the gathering of sea wreck, minus *sub majore*, as pasturage includes, casting seal and divot, &c. the

Lords found that these were quite distinct, and that the sea wreck came not under the clause *cum piscationibus*. Fount. 15. Dec. 1699, Fullarton.

A CLAUSE in the *reddendo* of a charter, *Solvendi quatuor solidos et quatuor denarios monetæ stirlingorum*, was found to import only Scots money. Newb. 26. June 1666, Wedderburn.

A WIFE, being provided to a certain yearly sum of free rent, it was found, That this must be over and above the teind and feu-duty; but that it did not free her from

Free rent. the cess and maintenance. Stair, 22. Gosh. 24. Feb. 1670, Cassilis.—The Lords found a difference between an obligation, “to free only liferented lands from all burdens imposed, or to be imposed, and to make them worth so many chalders of rent;” that the first of these clauses did extend indeed to the burden of the militia impos’d by authority, but could not extend to the reparation of a mill dam, the heritor offering to get a sufficient tenant for paying the ordinary duty yearly. Gosh. 23. Feb. 1669, Tarfappry.

A PARTY being bound to obtain himself validly and sufficiently infest; the Lords found, That this did not import a public infestment. Home, March 1688, Buchan.—The like; Fount. 18. July 1678, *inter eos*.

A PARTY having granted a disposition to his nephew, without an onerous cause, and burdened him, not only with all the debts already contracted, but reserved to himself a faculty to burden him further, during his life, with debts real and true; the Lords found, That this latter clause must import more than that the debts were not false, but, that those to be contracted, should be no mere gratifications to evacuate the disposition, and also should be so far onerous, as to be rational deeds of administration. Fount. 16. Dec. 1697, Sands.

AN infestment of four acres of land, found to be demonstrative, not taxative, and therefore was sustained against

against a process of removing, the pursuer craving the possessor to be removed from all that was above four acres. Dur. 2. Feb. 1630, Douglass. *Demonstrative or taxative.*

—If to an infestment of lands, under a general denomination, be added a more particular description, by expressing the names of the particular tenants, possessing some of the lands only, this will be reckoned taxative, to limit the infestment of the lands possessed by the particular tenants enumerated, tho' the rent of the parts be not sufficient to pay the sum, for the security of which the infestment was granted. Dur. 1. Feb. 1634, Murray.—Found, That a minister's presentation to vicarage teinds, as possessed by his predecessor, was not taxative, but demonstrative, there being no taxative word of *allenary*, or the like, subjoined. Harc. (*Ministers*) March 1683, Robertson.—A party being bound to pay an annuity out of the first and readiest of the rents of an estate; the Lords found, That, because of said clause, he ought to pay the annuity entire, notwithstanding his alledgeance, That he was not obliged simply, but out of the rents, and that these rents, because of the burdens, &c. would not extend to satisfy the same. Dirk 17. July 1667, Hermistoun.—A tack, being set, bearing "certain lands, containing 48 measured acres, with pasturage and pertinents, every acre to pay six shillots;" the setter insisted in a declarator, that there were 66 acres, and that the tacksmen should pay accordingly; which, however, was repelled, in respect the extent of the acres here was not taxative, but designative. Stair, 31. Jan. 1679, Roch-head.—A legacy, being left in these terms, *viz.* That it should be paid out of the household plenishing of the testatrix, and debts due her upon accompts; the Lords found, That altho' the said plenishing and debts, should not be able to satisfy the legacy, it was not a limited legacy, but ought to be satisfied out of the other executory, and that the said words were only *executiva*, as to the order and way of payment, in the first place; and *interpretatio* should be *ut actus valeat*, especially seeing the legatary was the deceased's relation. But here the Lords were convinced, that the executor had given up inventory, far short of what the moveables did

did really extend to. Dirl. 11. July 1676, Finlay.—A legacy of L. 1000, payable out of a certain subject, which was found to be heritable, was sustained, notwithstanding it was against the executor; this being understood demonstrative only, not taxative. Dur. Spot. (*Legacy*). 22. Jan. 1624, Drummond.—A legacy of 1000 merks, out of the rests due by the tenants, was found payable out of the rests only, and not otherwise performable, if there was not so much of rests. Stair, 21. Jan. 1673, Forbes.

A BURGH, by its charter, having granted to it, indefinitely, the escheats of all delinquents convict; the Lords found, That this cannot be extended to the escheats of such as are declared fugitive, and put to the horn for non-compearance in a criminal cause, but that such escheats do belong to the king and his donatar. Sinc. 25. May 1542, Ormiston.

ERECTION of lands into a earldom, with as ample powers as were competent to any other earl in Scotland, was found not to give that earl a right of regality, nor to his heritable bailie of the earldom, a right to be heritable bailie of regality. Forb. 9. July 1713, Montrose.

IN the style of law, these words, *Between and twixt and a certain term*, do not exclude the day of the term. Dirl. 26. Jan. 1675. Joint petition of the advocates.

A BOND, being granted by the donatar to an escheat, "That he being satisfied of what was resting to himself, should apply the rest at sight and declaration of the Lord treasurer;" the Lords found, That the declaration was to be understood, not of him who was treasurer when the bond was granted, but of him who is treasurer at the time when any acknowledgement shall be made upon the said bond. Auchinro. July 1632, Bowmaker.

IN a removing, at the instance of an heir of a donatar to a ward, against a tenant, this exception, That the tenant had a tack from the deceased, which was to stand during

Grant during pleasure.

during the said granter's pleasure, was not interpreted to stand during the ward, but that *voluntas mortis extinguatur*. Colv. Jan. 1583. Heiress and representatives of Earl of Morray.

A WOMAN, in her contract of marriage, obliging herself to pay to her husband 2000.

merks of tocher, "at least, to sub- *Clauses in con-*
"scribe and deliver assignations to as *tracts of mar-*
"many sufficient bonds, as would ex- *riage.*
"tend to that sum;" this clause was

found to import, That the sum must be paid by bond or assignation, as aforesaid; and that the moveable goods and gear, which fell otherwise to the husband, *jure mariti*, could not be imputed in payment thereof. 1. Jan. 1730, Kennedies.—A husband, who stood obliged by his contract of marriage, sufficiently to secure his wife in a jointure, amounting to 1000 merks a-year, having purchased some tenements and houses in Edinburgh, and provided the same to her in liferent; The Lords found, That this was not a sufficient equivalent provision, to answer the obligation in the contract, because of the accidents of fire, and the considerable reparations to which houses are subject, and therefore, decreed against the husband's heir, to fulfil the obligation in the wife's contract of marriage, and ordained her to renounce any right to the tenements. Here there was a clause in the contract, That the fund for the wife's jointure should be employed with her father's consent, which was not done. Harc. (*Contracts of Marriage*)

March 1685, Janet Lindsay.—A man, being obliged in his contract of marriage, to employ 20,000 merks, upon well-holden lands, to his wife in liferent, and the heirs of the marriage in fee, and execution to pass at her father's instance, who being debtor to the husband in as much as, with the tocher, made 20,000 merks, gave infestment out of his own wardlands for the same, in the terms of the contract; the wife, after her husband's decease, pursued his heir for implement of the contract, in respect that her father's lands held ward, and were in danger of recognition, and that her husband could not collude with him to her prejudice. Answered, She being infest, before the marriage.

riage, by her own father, who might have stopped the marriage, and at whose instance execution was ordained to pass, it must be supposed, That all parties agreed to the implementing of the contract, by a security out of the father's lands. The Lords, in this circumstantiate case, found the infeftment, out of the ward lands, sufficient, unless recognition be incurred. *Harc. (Contracts of marriage)* Nov. 1685, Kirkland, &c.

A PARTY, who had no children, except daughters, having tailzied his estate, failing heir male of his own body, to his three uncles, *successive*; but thereafter, by a declaration and obligation, having revoked the said tailzie, with this narrative, That the eldest uncle had offended him, and therefore declaring the tailzie null, and obliging himself, so soon as he returned to his own house, to destroy and take his name from the said bond of tailzie; and, after this, having lived six years, without destroying either the said tailzie, or the said revocation thereof; in a suit, at the instance of the second uncle, who was the next branch of the tailzie, against the deceased's daughters, who were heirs of line; this question being at full length debated, *viz.* Whether, by the revocation, the tailzie was annulled *in totum*, or only as to the first branch, and subsisted *quoad* the rest? it was found, That it imported a total revocation. Fount. 9. Dec. 1701, Burnet.

CLAUSE dubious, interpreted against the writer. *Stair*, 20. Dec. 1665, M^rLaud.

ONE having disposed his estate to his eldest son, burdened with all his debts contracted, or to be contracted; *pro expediendo licitas suas res et necessaria negotia*, the Lords found the son liable for a sum borrowed by the father, after the date of the disposition and infeftment upon it, without burdening the creditor, to prove that the money was truly applied *in rem versam* of the father. Fount. 7. Jan. 1703, Stuart.

THE commony of Biggar, lying within the barony of

of Biggar, did once belong in property to the family of Wigtoun, and, in all probability, had been possessed in common by the tenants of the family surrounding the same. The possessions lying about the common, were feued out at several times, and the vassals continued their possession of the common, in the same way that the tenants of the family had done before. The Earl of Wigtoun, insisting in a division of the common, claimed the *precipuum*, as proprietor. The defenders insisted, That they were conjunct proprietors: And the Lords found, That a disposition with *parts and pertinents*, joined with an uninterrupted possession of the muir, as extensive in all respects as the pursuer's possession thereof, constitutes a right of property; but where a disposition was in these terms, "with liberty and privilege of the commonty of Biggar," they found it only to import a right of servitude. They further found, That this clause, "With parts and pertinents, and common pasturage, "used and wont," doth only import a right of servitude, unless the feuer condescend upon some special right of common pasturage belonging to his lands; other than that, upon the said commonty, to which the general words of *common pasturage* may apply. 23. Jan. 1739, Wigtoun.

A FEU charter of certain lands, *et lie schiellis de Conynche*, was found to give the property of *Conynche*, and not a servitude only. Falc. vol. I. p. 46. Breadalbane, 15. Jan. 1745. *Later decisions.*

A DISPOSITION of lands, without mentioning the teinds, assigning the tacks, and with other circumstances, was found to convey them. Falc. vol. I. p. 361. Dunning, 5. July 1748.

A CONTRACT, disposing to a wife the half of insight plenishing, household furniture, and other moveable goods, was found not to comprehend *nomina*. Falc. vol. I. p. 79. Ker, 19. Feb. 1745.

A DISPOSITION of heritage, with burden of debts, does not preclude the heir from being relieved by the executor. Falc. vol. I. p. 56. Russells, 23. Jan. 1745. The like; Falc. vol. I. p. 249. Campbells, 12. June 1747.

A CLAUSE

A **CLAUSE** in a contract of marriage, providing the estate, failing heirs of the marriage, to heirs and assignees whatsoever, does not, on default of the heirs of the marriage, alter the former destinations made by the contractor. *Falc. vol. I. p. 67. Weir, 7. Feb. 1746.*

A **PERSON** being bound by his contract of marriage, to provide a share of the conquest to the heirs thereof, which failing, to his heirs whatsoever; the heirs of the marriage failing, without claiming implement, or disposing of their interest, the obligation is at an end. *Falc. vol. I. p. 293. Anderson, 26. Nov. 1747.*

PORTIONS to younger children, being payable on their marriages or majorities, or at their mothers death, which of the terms should first happen, provided that the portion of any of them, dying before marriage or majority, should fall to the rest, the substitution falls by their arrival at majority. *Falc. vol. I. p. 297. Bothwells, 3. Dec. 1747.*

A **BOND**, being granted to a husband and wife, in conjunct-fee and liferent, providing that the husband should have power to dispose of part of the sum, and the wife of the remainder, the heirs of the wife, who survived the husband, were found preferable to his creditors for that part of the sum which was stipulate to be at her disposal. *Falc. vol. I. p. 285. Riddells, 6. Nov. 1747.*

A **CLAUSE** in a contract of marriage, whereby the wife accepted the provisions in full of all she could claim thro' her husband's decease, was found, in consideration of the circumstances of the case, to exclude the claim of her next of kin on her decease. *Falc. vol. I. p. 193. Crawford, 6. Jan. 1747.*

A **CONTRACT** of marriage, providing the fee of an estate to the heir, with absolute warrandice, does not intitle him to use inhibition. *Falc. vol. I. p. 340. Gordon, 3. June 1748.*

A **DISCHARGE** by an heir, of all claims on his father's estate, does not hinder him to reduce a death-bed-deed. *Falc. vol. I. p. 27. Irvine, 15. Dec. 1744.*

AN estate being disposed to a second son, with the burden of provisions to younger children, redeemable, for a rose-noble, by the disponent and his assignees, which power he assigned to his eldest son, was found affectable, with

with the provisions in the person of the eldest son. Falc. vol. I. p. 334. Beatsons, 3. June 1748.

AN estate, being tailzied to heirs female of the disposer's body, and the heirs male of the said heirs female, providing that the heirs female should bear his name, the son of his daughter succeeding, was found obliged to bear it. Falc. vol. I. p. 368. Hamilton-Gordon, 13. July 1748.

A DISPOSITION to trustees, for the use of the creditors of another than the disposer, with power to them to prefer such as they pleased, providing that none of the creditors should have right to affect the subject disposed, or sue any action thereon, was found not to hinder the whole creditors, jointly, to insist personally against the trustees. Falc. vol. I. p. 291. Creditors of Duke Hamilton, 24. Nov. 1747.

A SUBMISSION being made to arbiters, and in case of variation, to an oversman, with power to them to prorogate, the oversman was found to have power, on reference being made to him, to prorogate. Falc. vol. I. p. 375. Macbryde, 21. July 1748.

ARBITERS having decerned for a sum, with annualrent, from a term, providing, that if the creditor should neglect to grant a discharge of all his claims at the said term, the interest should only commence on his granting the discharge; this was found, tho' it was pled, that the discharge being granted, the debtor suffered no prejudice by its being delayed. Falc. vol. I. p. 252. Shaw, 17. June 1747.

A POWER to a seller to redeem, within a limited time, without mentioning assignees, is not assignable. Falc. vol. I. p. 358. Niel, 28. June 1748.

A PROHIBITION to alienate, does not hinder to vest in trustees for the person's own behoof. Falc. vol. I. p. 64. Trustees of Murray. 5. Feb. 1745.

A FOUNDATION of an episcopal chapel, in the terms of the toleration, giving the vestry power of chusing the ministers so often as they should be removed by death, or for a just cause, was found to give them a discretionary power of removing for cause. Falc. vol. I. p. 287. Foullis, 10. Nov. 1747.

A LETTER, promising to bind conjunctly for a bargain, was found to bind the writer conjunctly and severally.

severally. Falc. vol. II. p. 229. Sloan, 5. Feb. 1751.

FROM a brother to a sister, promising her a bond for a sum, was found to oblige him to grant it, free of all clogging conditions. Falc. vol. II. p. 290. Ker, 29. Nov. 1751.

FROM a seller to a buyer, promising to deliver the goods, free of all risk, found to import only the seller was to suffer the loss on deterioration, but not to be liable in damages. Falc. vol. II. p. 49. Robertson, 31. Jan. 1749.

A BOND, from a father to a daughter, in full of what she could ask as legitim, or any manner of way, was found to be in lieu of a sum left her, with which he had intromitted. Falc. vol. II. p. 291. Fife, 29. Nov. 1751.

CONTRACT of marriage, settling the conquest, with exception of a bond, granted or to be granted, to the husband's children of a former marriage, was found to give them a right, tho' no bond was ever granted. Falc. vol. II. p. 44. Mercers 18. Jan. 1749.

A FARMER, being obliged by a contract of marriage, to employ a sum for himself and wife in conjuncture and liferent; and his children in fee, was found not obliged to turn his stocking into money; and being charged for that purpose, and his effects arrested, the charge was suspended, and the arrestment loosed, without caution. Falc. vol. II. p. 151. Henderson, 22. Feb. 1750.

A BOND, granted to the children of a person, with power to him to receive the annualrent during their minority, and in certain cases and manner, to uplift part of the principal sum; and a second, granted without mentioning annualrent, but to be paid and divided in the same way, and with the same conditions and restrictions, the second was found to bear annualrent. Falc. vol. II. p. 186. Stewart, 16. Nov. 1750.

A PROVISION to a child, payable at a term when he would be 16 years of age, is not due to the child predeceasing. Falc. vol. II. p. 51. Bells, 1. Feb. 1749.

PROVISIONS to children, payable at their age of 18, and if any of them died, the share to accresce to the rest, were found to accresce, whether they arrived at that age or

or not. Falc. vol. II. p. 128. Binning. Dec. 15. 1749.

A FATHER left his whole effects to his son, which he estimated at a sum, burdened with portions to his younger children, declaring, that if any of his children died, his portion should accresce to the survivors; the son was found comprehended in this provision, and that he dying, his portion accresced. Falc. vol. II. p. 122. Carnegy, 8. Dec. 1749.

A LEASE to an husband and wife, and the survivor, is vested in the wife surviving, not as heir. Falc. vol. II. p. 114. Boyd, Nov. 22. 1749.

A SUBJECT being disposed in a marriage contract, by the wife's father to the spouses, in conjunct-fee, and her heirs, the wife was found heir. Falc. vol. II. p. 174. Wordy, 18. July 1750.

A SUM, in a contract of marriage, being settled on the spouses in conjunct-fee and liferent, and to return to the bride's father, in case of her predecease without children, was found to return only after the husband's death. Falc. vol. II. p. 29. Rae, 16. Dec. 1748.

A BOND, granted by one brother to another, returnable, if he died without children, being no gratuity, but what the granter was bound to as the condition of an estate, settled on him; it was found, That the creditor could dispone, for rational, as well as onerous causes. Falc. vol. II. p. 97. Nairns, 28. July 1749.

A RENUNCIATION of legitim, by an only younger child, was found not to bar him from claiming the whole executry. Falc. vol. II. p. 65. Martin, 22. Feb. 1749.

A BOND, by a tutor-in-law, that he should exerce the office, was found not to imply, that he should compleat his title, and therefore, the clerk was not found liable for neglecting to take caution, as the cautioner would not have been liable. Falc. vol. II. p. 18. Liddel, 29. Nov. 1748.

A DISPOSITION of superiority, burdening it with the vassal's right, was found to make the superior liable to anomalous conditions, in the vassal's charter. Falc. vol. II. p. 7. Nasmyth, 9. Nov. 1748.

A GIFT of patronage, *cum decimis*, was found not to convey the teinds. Falc. vol. II. p. 35. Heritors of Kirkpatrick. 4. Jan. 1749.

A CHARTER from a subject, *sum molendinis* in the
Y 2 *tenendas;*

tenendas, liberates from restriction. Falc. vol. II. p. 132.
Harrows, 4. Jan. 1750.

AN HERITOR, having right to fish in a certain part of a river, it was found, That the opposite heritor, who was infest in a barony, *cum piscationibus*, but had never fished in that place, could not begin to fish, so as to interfere with the former's fishing. Falc. vol. II. p. 134.
Perth, 9. Jan. 1750.

IN a marriage-contract, discharging all claims competent to the wife, or her nearest of kin, in the event of the husband's decease, was found to exclude her nearest of kin, in the event of her predeceasing the husband. Home, p. 369. Thomson, 18. Feb. 1743.

A RELICT, having accepted certain provisions in her contract of marriage, in full of all other demands, and agreed, that these should stand in full force, in case the marriage dissolved within year and day; she was found intitled to aliment and mournings, tho' her husband died within year and day. Home, p. 373. Garden, 19. Feb. 1743.

CLAUSE of registration in bonds, its history and progress. Remark. Dec. p. 210. Sheriffs clerks, 19. July 1748.

THE words of a deed, disposing, "all lands which should pertain to the granter at the time of his death, to his brother's heirs and assignees whatsoever," were found not to comprehend a subject, to which the granter afterwards succeeded, which, from circumstances, appeared not to have been within the granter's intention. Fac. Col. vol. I. p. 283. Farquharson, 2. March 1756.

A CLAUSE of return, of a tocher in a contract of marriage explained, *ex equitate* according to the probable meaning of parties, against the obvious signification of the words. Fac. Col. vol. II. p. 120. Campbell, 16. Dec. 1757.

ON the 14. Sept. 1754, Fairy, agent for Coutts and company, wrote to Allan and company, "Gentlemen, I acknowledge to have sold from 600 to 800 bolls of north-country meal, crop 1754, good and sufficient oat-meal, at 10s. 8d. Sterling *per* boll, deliverable at the harbour of Irvine, as soon as wind and weather will allow; payable at Martinmas next, and the 1. Jan. in equal proportions." Of the same date, Allan, in answer to this letter, declared his acceptance of

of the bargain; adding, that the meal should be delivered in three weeks. Within the time appointed, Courtts shipped 600 bolls of meal, of crop 1753, from Portsoy for Irvine, and made offer of it to Allan. Allan not having occasion for the meal, refused it, on this ground, That, in terms of the letter, it was not of crop 1754. Courtts having brought a process against him, he founded his defence on the strict terms of the letters, which bound him to receive meal only of crop 1754. Answered for Courtts, The words, of crop 1754, had been put in by the inaccuracy of Fairy, instead of crop 1753; that crop 1754 could not be in the intention of parties, because it was impossible it could be delivered of that crop from Portsoy to Irvine in three weeks after the date of the letters; seeing the gentlemen's farm-victual in that country are not deliverable till between Yule and Candlemas. Replied, When an impossible condition is annexed to a bargain, the effect of it must be, to void the bargain altogether; *l. 31. Pand. De obligat. et act.; Stair, lib. 1. tit. 3. § 7.; and again tit. 10. § 13.* The Lords found Allan liable for the price of the meal offered to be delivered. *Fac. Col. vol. II. p. 144, Courtts and Co. 9. Jan. 1758.*

SEA-WEED, of which kelp is made, belongs to the heritor, whose lands lie next the shore, in virtue of his grant thereof, with wreck and ware. *Fac. Col. vol. II. p. 406. Morton, 20. June 1760.*

A CLAUSE, obliging the heritor to repay to the tenant, at the end of the tack, what he shall lay out on fences, is effectual, tho' the tenant purchase the lands during the currency of the tack. *Fac. Col. vol. II. p. 482, M'Doual, Dec. 17. 1760.*

C L A N - A C T.

THE clan act, takes place with regard to heirs apparent. *Rem. Dec. p. 229. Duke of Gordon, 19. Feb. 1760.*

C O L L I E R.

IT was found, That the act 11. parl. 1606, anent coal-bewers, relates only to going coal-pits, and that therefore

therefore it was lawful for parties to see, hire, and conduce coal-bewers, where coals are given up, or not able to maintain the men. *Hope, (Coal-heughs) 7. March 1616, Lothian.*

IN a requisition of colliers, upon the act 11. parl. 1606, and act 56, parl. 1661, the Lords found, That colliers cannot be hired without a testimonial from their former master, and this, tho' that master had wanted coal for several years, and his colliers, without his consent, had gone into the service of another. They found, however, That he might require them to his service again after he had got a going-coal of his own, tho' they were several years away from him, seeing they had not been year and day in the defender's work. *Fount. 4. Feb. 1708, Wallace.*

A PERSON, having colliers by tolerance from their master, but detaining them after requisition, made at the coal-hill, is liable in the penalties of the act 11. parl. 18. James VI. *Falc. vol. I. p. 365. Gibson, 6. July 1748.*

A MASTER does not lose his property in a collier, by the collier's being year and day from his service, and in the service of another. *Fac. Col. vol. I. p. 172. Dundas, 19. Nov. 1754.*

A COAL master having, for a time, given up his work, and the colliers having, by his permission, settled at another coal-work in the neighbourhood, from which they afterwards deserted, it was found, That the proprietor of this last work, had no right of reclaiming them, tho' some of them had been more than a year in his service. *Fac. Col. vol. II. p. 186. Bogle, 1. March 1758.*

A PROPRIETOR of a coal-work, in possession of a collier, for year and day, can reclaim such collier, and recover the penalty of the statute 1606, from a third party. *Fac. Col. vol. III. p. 16. Dundas, 22. Jan. 1761.*

COLLIERS, working at a coal, during a lease, become bound to the coal, not to the lessee. *Fac. Col. vol. III. p. 303. Spence, 24. Jan. 1764.*

COLLATION.

THERE is no collation in our law, but in the case of succession in moveables, and therefore, not amongst heirs portioners, whatever separate provisions any of them may have got by contract of marriage, or otherwise.

Stair, Gosh. 20. Dec. 1673, Jack. Fount. 19. Feb. 1695, Sinclair.

Has no place except in succession of moveables.

LANDS being provided in a contract of marriage, by the first clause to the heir, and the conquest to the children by a subsequent clause; the Lords found, That the heir had a share in the conquest (tho' it was most part executry) without collation, because he was also a child. Fount. 27. July 1680, Brown.

Nor where the succession to moveables is in virtue of a destination.

A SECOND son, insisting for his legitim, was not obliged to collate a provision of land, which he got from his father; for collation is introduced to keep equality amongst the children, only as to the moveables, and since the moveables suffer no diminution, by giving a provision of land to the second son, there could be no reason for the collation. Stair, 14. Feb. 1677, Buccleugh. — For the same reason, in drawing a share of the moveables, an heir-portioner is not bound to collate with her sisters, an estate disposed to her by her father. Home, 29. Nov. 1720, Ricart.

Nor with regard to any subject, except moveables.

COLLATION takes no place where it is prohibited; as for example, where a father, in his daughter's contract of marriage, besides her tocher, made this provision, "That she should have an equal portion of his goods, at his death, with his other children." Dur. 19.

Nor where a separate provision is given, excluding it.

Feb. 1631, Corfan. — Or, where it was provided, in her contract of marriage, "That she should be a child

child

"child in the house, at the time of his decease." 18. Nov. 1737, Beg.

COLLATION takes place only amongst brothers and sisters, and not when they compete with the relict. Dur. Spotis. (*Foris familiaris*) 27. Feb. 1637, Rofs. — *Has no place in the division of moveables between the children and relict.* An only child being *foris familiaris* by marriage, and having got a tocher, but not bearing, *In satisfaction of childrens part*, was found, notwithstanding,

obliged to collate that tocher with the relict, before she could have access to draw her third share of the deceased's moveables. Stair, 18. Feb. 1663, Dunbar. — The contrary found, 11. Dec. 1719, Lady Balmain. — There being only one child, who was both heir and executor, he was found to have the whole childrens part, without collating the heritage with the relict. Stair, Fount. 12. Jan. 1681, Trotter.

THE heir can have no part of the moveables, (excepting heirship), unless he be willing to collate. Balf. (*Heir*) 19. April 1554, Law. Mait. observes it 14. July 1553, and 24. April 1554. — The heir collating his heritage, has a title to a share of the childrens part; Stair, 16. July 1678, Murray; but is obliged to collate whatever is derived to him from his father, whether by disposition or representation. Stair, 23. July 1678, *inter eosd.*

COLLEGE.

What professors have privilege of voting.

THE whole administration of a college, being, by the first institution, lodged in the *præpositus*, a *licentiatus*, and a *bachelarius* of divinity, which two last were suppressed at their formation, and four professors of philosophy put in their stead; in a comparative trial for one of the regent's places, two of the three regents having voted for one of the competitors, and the third a *non liquet*, yet the *præpositus*, by himself, installed the other, alleging That

That the regents were but his assessors, and had no share of administration: But the Lords found the contrary, annulled the nomination, and preferred the other. Fount. Forb. 22. July 1707, Halden.—A college having been erected by the king, and confirmed by the pope, naming those who were to be masters; but there having been lately two other masters added by the sovereign, for professing other sciences there, and in a comparative trial for the regency, the principal having refused these two their votes, as not being on the first foundation; The Lords found the principal in the wrong, and that they had good right to vote. Fount. 21. Dec. 1711, Burnet.

A PROFESSOR, in a college, having been absent more than a month, by occasion of a process before the Lords, raised against him by the other masters, and being thereupon deprived by the head of that house summarily, it being contained in their foundation statutes, That absence, for above a month, shall, *ipso facto*, debar them, and the bell being refused to be tolled, and access to the common auditory denied him; the Lords, upon his summary complaint, seeing the defender had proceeded to sentence and debarment by himself alone, without the judicial presence of the other masters, ordained the pursuer to be repossessed, and the bells to be rung, and doors to be opened, as before, without prejudice to the defender and the other founded masters (who are judges in such accidental transgressions) in a collegiate manner, to convene the pursuer, and proceed according to law. Fount. 19. Feb. 1712, Gordon.

POWER of administration in masters of colleges. See Community.

COLLEGE of JUSTICE.

Abstract of the Declarator of the Privileges of the College of Justice.

THE Lords declare the members of the college of justice, exempt from payment of the ministers' stipends,

stipends, as also from watching, warding, and all impositions for the same; from payment also of all customs, cawley-malls, shore-dues, and other impositions, laid on their provisions for their families, and their other goods, carried to or from the town, for which a certificate from the party (being a member) that they belong to him, is declared sufficient, the same being renewed once in the half year. Further, the Lords declare them exempt from the civil jurisdiction of the magistrates, and that it is sufficient to propound a declarator, without the necessity of an advocacion. But as to the criminal jurisdiction, their Lordships, before answer, declared, That they would take trial what had been the former practice. Moreover, in case of a public tax, laid on by the government, they ordain, That a special stent be laid upon the town for their quota, and so much more only as may defray the charges of collecting, &c. Wherein no exemption is to be given to the present magistrates, stent-masters, tenements belonging to the town's common-good, to trades, &c. but this, without prejudice to the town of Edinburgh, to lay on the proportions of these, who have been in use to be exempted, upon their neighbours, but not upon any member of the college of justice. The Lords declare further, That they will, from time to time, nominate an advocate, and a writer to the signet, for each quarter of the town, to meet with the city stent-masters, and to see that the valuation be equally made, and the magistrates are appointed to intimate the time of their meeting to the Lord President, Dean of Faculty, and keeper of the signet, ten days before, in time of session, and twenty in vacation time. *Lastly*, They declare the persons following to be members of the college of justice, *viz.* The Lords, Advocates, clerks of session and of the bills, writers to the signet, the outer-house clerk, and one substitute for registrations in each of the three chambers, the three deputies of the clerks to the bills, the clerks of exchequer, the directors of the chancery, their deputies, and two clerks thereof, the writer to the privy-seal, and his depute, the clerk to the register-general of sales and homings, the masters to the session, the keeper of the minute-book, and the keeper of the rolls of the inner and outer houses.

And their Lordships do extend all these privileges to one servant for each Lord, one for each advocate, four extractors in each of the three clerks offices, two servants that keep the public register, the keepers of the session-house and advocates library, who are all to forfeit their privilege if they keep any shop, tavern, &c. Home,

Feb. 1687, College of Justice, *contra* Town of Edinburgh.

THE director of the chancery is a member of the college of justice. Stair, 22. Jan. 1669, Collector-general of the taxation, *contra* Director of Chancery.

Director of the chancery a member.

THE exemption of the members of the college of justice from all civil courts, except the court of session, was found to extend even to causes merely spiritual, ecclesiastic and consistorial,

Exemption from answering to other courts, save the session.

Colv. Dec. 1582, Bothwell.

FOUND, that the relict of a Lord of session, enjoys the privileges of her deceased husband during her widowhood. Ersk. 7. June 1593, Traquair. — The privilege of advocating causes to the Lords from inferior courts, was extended to the relict of a member of the college of justice, she always remaining a widow. Had. 23. Feb. 1610, Sands.

Privileges extended to the widows of members.

A LORD of session, either ordinary or extraordinary, has privilege to get his actions called in the inner-house, and cannot be compelled to answer in the outer-house. Had. 9 March 1610, Melvil. Had. 27. June 1611, Hamilton.

Privileges of a lord of session, not to answer in the outer-house.

A PERSON was found not to have forfeited his privilege as a member of the college of justice, by retiring to, and residing in the abbey, to shun the diligence of his creditors. Forb. 11. Jan. 1710, Anstruther.

Retiring to the Abbey, if it be a forfeiture of privilege.

MEMBERS of the college of justice are only obliged to

Members must
answer to sum-
mary com-
plaints.

to answer summarily upon bill, as to what concerns their offices, or what is acted by them in that quality. Stair, 24. June 1675, Muir.—A petition being presented against an advocate, craving that he might exhibit some papers necessary for the petitioner, a minor, in a process; but the advocate having got them not *qua* advocate, but *tanquam quilibet* from another advocate, the Lords refused to cause him depone summarily *hoc ordinis*, tho' a member of the house. Fount. 16. July 1687, Fairholm.—A party having given in a summary complaint against an advocate and a writer to the signet, alledging that they had abstracted some of a deceased's papers, to whom the complainer was nearest of kin; the Lords found, That this was a malversation alledged on them, not committed by them in their office and trust as members of the college of justice, but wholly extrinsic thereto, and defamatory, as an accession to theft; therefore they refused to take it in *hoc ordine*, but left the petitioner to his ordinary course by exhibition. Fount. 3. Dec. 1695, Prestongrange. A summary bill having been given in against the representatives of a writer and agent, craving warrant to get up papers summarily, upon receipt and inventory, and upon paying what was due to the deceased by accompts; and it having been suggested, That these papers came not in the deceased's hands as writer or agent, but as factor for managing their business, and that some of the writs might be instructions of his accompts; the Lords found, That they could not be given up in this manner, but that the agent's heirs must be called, *via ordinis* in an exhibition, *tanquam quilibet*. Fount. 28. Dec. 1699, Children of General Douglas.—A writer to the signet, in a dying condition, was found not obliged summarily to depone, on a petition, touching his having of writs belonging to the petitioner, who could not say that the writer had received these writs from him, *rati onis officii*. Forb. 2. July 1708, Temple.—A summary complaint having been presented by one of two tutors, against the other, craving that the other, who was a clerk in the bill chamber, might be removed from the office of tutory for his malversations; the Lords refused the

com-

complaint, in regard that his trust noways related to his office as clerk, so that he was to be considered, *tanquam quilibet*. Fount. 26. Jan. 1712, Carruthers.

COLLUSION.

A PARTY, having denounced a debtor, in order to lead a comprising, and the debtor suspending, the denouncer was preferred to another, who denounced and completed his comprising, and got himself infest before the suspension could be got discussed; the said person having procured the suspension by his own travel and expences. Dur. 28. Nov. 1628, Borthwick.—A comprising was found null by exception, because the debtor was brought within the country, to the effect it might be led upon fifteen days warning, to the prejudice of a third party, who had denounced before, upon sixty days. Hope, (*Dolus*) 13. Nov. 1620, Wardlaw.—A compriser having charged the superior before another's comprising was led, and the superior having suspended the first, and freely entered the second, without a charge; the first was preferred, in respect of his diligence, altho' the other was infest, and three years in possession. Spot. (*Comprising*) Dur. ult. Jan. 1632, Fergusson.—A similar case; Stair, 3. Dec. 1664, Clerkington.

IN a competition between a poinder and arrester, the latter was preferred, because the party, in whose hands the arrestment was laid, had voluntarily exhibited and delivered the goods to the poinder's servant. Hope, (*Arrestment*) 7. Feb. 1616, Kinloch.

IN a competition between the creditors and executors of a deceased, the Lords refused to prefer one creditor to another, altho' their diligences were not alike, some of them having obtained decrees; because the executors had not opposed these, but had defended against the others, who otherwise had been as diligent as they: for thus it would be in the executors power to prefer one creditor to another. Dur. Spotif. (*Creditor*) 20. Jan. 1631, Brown's Creditors competing.

COMMISSIONERS OF SUPPLY.

IN a competition, which of two persons was duly elected collector of the land-tax for the shire of Caithness, it was found, That, after elapsing of the day appointed by act of parliament, the sheriff of the shire was the proper officer to appoint another diet for the first meeting of the commissioners of supply. 3. Jan. 1729, Sinclair.

IN a question between Irvine of Bruckley, and Forbes of Thornton, which of them was duly elected collector of supply for the shire of Mearns; it was objected by Forbes, That Irvine's party had proceeded to name their preses or convenor, before qualifying themselves to the government, which he apprehended was a plain nullity, no less than acting as commissioners of supply without taking the oaths. This objection was repelled, and Bruckley's election found legal, conform to the directions of act 6. parl. 1693. 11. July 1728.

BY act of parliament, both superior and vassal have a right to vote for the same L. 100 valued rent, 25. July 1735, Hay.

AN action being intended against the dean of guild of Wick, and bailies of Thurso, as liable to the penalty of L. 20 Sterling, for having presumed to act as commissioners of supply in the shire of Caithness, without being possessed of the qualifications required by the supply act, that is, without being infest in the superiority or property, or possessed as proprietors, or liferenters of lands, valued in the tax-roll of the county, to the extent of L. 100 Scots *per annum*, or to the extent of L. 20 Sterling of real rent; the defenders were found not liable in the penalty of the act of parliament: for the Lords thought, that these qualifications related only to the particular persons, *nominatim*, appointed commissioners, not to these appointed *virtute officii*. 1. Jan. 1729, Sinclair.

COMMON INTEREST.

A PROCESS of removing, at the instance of one adjudger, cannot proceed without concurrence of the rest,

rest, unless the pursuer offer a more solvent tenant, or a greater rent, in which case the interest of any person *in re communi*, cannot hinder the common advantage of all concerned. Stair, Fount 21. Dec. 1680,

—The removing, in such a case, allowed to proceed, upon the adjudger's finding caution to make the rents effectual. Falc. Nov. 1681, Halliday.

WHERE parties have a joint and equal interest in an estate, the principal writs fall to the keeping of the portioner, who offers caution to the others for their security, and he is bound, notwithstanding, to contribute in common for the charges of transumps. Dirl. 26. Jan. 1675,

—An eldest brother preferred to the custody of the writs, tho' the estate was in Holland, where all the children succeed equally, and another brother had purchased in all the other childrens parts. Dirl. 29. Feb. 1677,

—In a dispute, who should have the keeping of common evidents, the Lords appointed bonds to be given into the register, and either party to take out an extract, at their own charges; and as to dispositions, charters, and other writs, they appointed them to be inventoried, and an obligation to be subjoined to the foot of the inventory, by the person who was to have the keeping of the writs, as having the greater interest, to make the same forthcoming to the other party, on all necessary occasions. Fount. 25. Dec. 1711, Pitcairn. —The eldest heir-portioner, has the custody of the writs, and must give transumps to a younger sister, upon the equal expences of both. Stair, 23. July 1680, Cunningham. Fount. 21. July 1708, Cowie. —The same was found, tho' a younger sister had acquired right to another sister's proportion, and so had a greater interest than the eldest. Dirl. 17. July 1638, Denholm.

COMMONTY.

IN the division of commonities, between a proprietor and others having servitudes, the proprietor ought to have a fourth part allocated to him, *tantum praeipium*, as the value of his property, and the remainder ought to be divided proportionally, conform to the act 1695, amongst the neighbouring heritors, who have possessed

the same as commonty, allowing the proprietor likewise a share in that division, effecting to his lands, whereof the tenants had promiscuous possession with the heritors of the dominant tenement. Home, 7. Jan. 1724, Hog. In this case, the suit was at the instance of a feuer. But in a process of division of the commonty of Biggar, at the Earl of Wigton's instance, against his feuers, some of whom were conjunct proprietors of the muir, others had only servitude of pasturage upon it; it was objected against the *præscriptum*, by those who had servitudes, That the rights were derived from the pursuer's predecessors, and were a burden upon his property; that there was no foundation upon the act 1695, for pursuing a division, unless in the case of common property; that the defenders must be allowed to enjoy their servitudes, as stipulated to them; that the proprietor was impowered to confine them to ground sufficient for their servitude, but that further he could not go. The Lords found the defenders, having rights of servitude, are entitled to have a proportion of the commonty set apart to them, equivalent to these rights. 23. Jan. 1739, Wigton. In a process of division, upon the act 1695, at the instance of a superior against his vassals, to whom he had granted servitudes of common pasturage, on a muir which was his property, it was found, That the act gives no title to sue a division in this case. 1. Feb. 1740, Stewart.

IN a process of division, upon the act 1695, of a common property belonging to two neighbouring barons, the rule of the division was found to be, not the value of the tenements that lay contiguous to the commonty, but only of the tenements which had been in use to pasture there. 6. Nov 1739, Dalrymple.

THE owners of dominant tenements are not entitled, on the division of the servient muir, to have any share of the property, but the *Later decision*. surface may be divided. Falc. vol. I. p. 336. Stewart, 3. June 1748.

LANDS, of which a muir is pertinent, as common property, are entitled, on a division, to a share effecting to their valued rent, notwithstanding they have also pasturage on another muir. Falc. vol. I. p. 352. Sharp, 16. June 1748.

THE

COMMUNION ELEMENTS. 269

THE proprietor of a barony, is only entitled to a share in a commony effecting to the valued rent of such of his lands as have possessed the commony, and not to the valued rent of his whole barony. *Fac. Col. vol. 4. p. 68. Moncrief, 15. Dec. 1752.*

IN the division of a commony the possession of part of a barony, was found to preserve the right to the whole barony, where the whole had formerly been in use to be possessed. *Fac. Col. vol. II. p. 100. Balfour, 23. Nov. 1757.*

COMMUNION ELEMENTS.

A MINISTER, charging 40 merks for communion elements; the Lords found the same due, tho' he had not given the communion, but ordained the same to be put in the poor's box, according to an offer made by the charger. *Stair, Fount. 29. Nov. 1678, Birnie.*—Found that the yearly modification for the communion elements cannot, when the sacrament is not administered, be diverted to the benefit of the minister, but ought to be applied to the poors use. *Forb. 21. July 1713, heritors of Abdie.*

SOME of the heritors of the parish of Strathmiglo brought a process against Mr Gillespie, before the sheriff of Fife; libelling, *Later decision.* That he had neglected to administrate the sacrament for several years; notwithstanding whereof, he yearly uplifted, for his own use, the sum modified for communion elements, by his decree of locality; thereby depriving the poor of the said parish, of a certain sum justly appertaining to them by the laws of this kingdom: Therefore, concluding &c. The sheriff pronounced the following interlocutor: "Having considered this process, with the defences, and answers thereto, ordains the defender to produce a signed condescendence, of the time of his admission as minister of Strathmiglo, and of the years he has administered the sacrament since that time:" whereupon he offered a bill of advocacy. The Lords refused to advocate the cause. *Home, p. 316.* Heritors of the parish of Strathmiglo, 10. June 1742.

COMMUNITY.

*How far a
community is
bound by the
deeds of its ma-
gistrates?*

FOUND, that the magistrates of a burgh, accepting a charter, containing thirlage to a neighbouring mill, was sufficient to bind up the inhabitants from repudiating the same, tho they were not formerly subjected to the thirlage. But here the charter contained some new privileges in the town's favor. Fount. 23. July 1700, Moncrief.—The magistrates of a burgh, having granted bond for a large sum, as the price of a tack of teinds set to the town; the Lords refused to allow the burgh afterwards to quarrel the deed, as done to the prejudice of the community, on pretence that they were as minors, but reserved to the town personal action against these magistrates who made the transaction. Falc. 24. Nov. 1685, Arch-bishop of St Andrews.—In a reduction of a feu-right, and of a tack, for two nineteen years, granted by the magistrates and town council, 1700. As contrary to the 36. act, parl. 1491, which custom has so far only altered, that tacks may be set for longer than three years, providing the consent of the convention of burghs be obtained; 2d0, As lesion, the tack-duty being not the half of the yearly worth of the lands; The Lords, before answer, allowed the value of the ground to be tried, and the custom of the convention of burghs ratifying tacks. Fount. 1. Feb. 1698. Magistrates of Edinburgh.—In a reduction of a tack of the town's impost-duty, set by the magistrates and town-council of Edinburgh, upon this ground, That it was for an under-value, without a public roup; the Lords found, That the magistrates were not obliged to set the tack by way of public roup; and found, that the tacksmen, having taken the tack from the magistrates, who had power to set the same to them, the reasons of reduction were not relevant against them; and therefore repelled the same, and assilzied the tacksmen, reserving to the pursuer to insist against the magistrates, for mal-administration, as accords. 16. Dec. 1735, M'Ghie, &c.—By act 28th, parl. 1693, magistrates, who grant bonds, *virtute officii*, without a previous act

of

of the town-council, authorising the same, are made liable to relieve the town of the said debt, without prejudice to the right and security of the creditor. And magistrates of a burgh, having granted bond to their provost, for the time, without following out the requisites of the act; it was found, That the bond did not prove its onerous cause, and therefore, that as the pursuer, *qua* magistrate, would have been bound to relieve the town, had the bond been granted to a third party; so, being granted to himself, he can have no action, unless he will prove the onerous cause. Fount. Forb. 13. Feb. 1711, Ross.—A burghess brewer of Edinburgh, possessing a tenement of land there, was found thirled to mills acquired by the Good Town and annexed to the royalty many years after the erection thereof, such burghesses, by several acts of the town-council, being ordained to go to these mills with their grain, under the pain of elethead of what is abstracted, and payment of double multure; tho' it was alledged, That magistrates, who are but administrators for the good of the inhabitants, have no power to impose burdens upon them, and can no more, at their own hand, impose a thirlage, than they can impose two pennies on the pint of ale. Forb. 31. July 1708, Montgomery.—The common good of burghs royal must be let yearly, by roup. Stair, 27. Jan. 1681, Jack.—A process, having been raised by the burgh of Wigtoun, against the burgh of Stranraer, the matter was settled by transaction, after this manner, That in regard Stranraer not being inrolled in parliament, was burdened with no assessment, therefore the magistrates thereof, bound themselves, and their successors in office, to pay to the Magistrates of Wigtoun, a certain proportion of whatever assessments should be laid on them by parliament. The Lords found, That the magistrates and council of Stranraer, could not burden their town with this assessment, and therefore reduced the contract. Stair, 6. Jan. 1681, Town of Wigtoun.

In a pursuit, at the instance of the magistrates of Glasgow, against John Barns, their late provost, for payment of L. 1700 he was owing to the town *per* bond, it was alledged for the defender, That he is discharged of the said bond, by

Magistrates cannot alienate gratuitously.

an act of council, granted for the onerous causes of good services done to the town; and, that it is ordinary to gratify the good services of magistrates. Answered, magistrates are but administrators of the town's common good, and cannot, more than curators, gift away any part. The Lords decerned against the provost, Harc. (*Magistrates*) 3. March 1685, Provost of Glasgow, &c.

MAGISTRATES of a burgh, against whom a decree is taken, as representing the town, cease to be liable after expiry of their office, but diligence may be followed forth against the succeeding magistrates, the same way as if the decree had been taken personally against them. Dur. 15. Jan. 1624.

Magistrates bound, as representing the town, if liberated by expiry of their office? Drumlanrig.—The late magistrates of a burgh, being charged for the rests of their minister's stipend, for which they had granted bond, bearing annualrent, the Lords, notwithstanding their being only bound *ratione officii*; found them liable, *in solidum*, for the principal sum and bygone annualrents then resting, but superseded extract for a time, and ordained the inhabitants to be stented for their reimbursement; and the inhabitants being cited for that effect, at the market-cross of the burgh, by virtue of their Lordships' ordinance, the Lords appointed a person to stent them Home, Jan. 1685, Honyman.—Money, being borrowed for the use of a royal burgh, and bond granted by the magistrates, binding themselves conjunctly and severally, and their successors in office, the town only was found liable in payment, and not the subscribers, after they were exacterate. Fount. 7. Feb. 1695, Bowie.—In a pursuit against *quondam* magistrates, for payment of a bond granted by them while in office, it was urged, That tho' regularly exacterate, magistrates are not personally liable for bonds granted by them, *virtute officii*; the defenders must be liable in this case, in regard, there is no succeeding magistrate against whom the pursuers can have action. The Lords, in respect of the answer, sustained process against the defenders, and decerned, superseding extract for a competent time, that the defenders might stent the inhabitants

habitants of the town, and affect the common good for raising the money. Hare. (*Magistrates*) Feb. 1686, Lawton.

COMMISSION granted by the major part of the masters of an university, was found sufficient to bind the university, unless, *University, how far bound by the deeds of the masters?* by the foundation, any of them were possessed of a negative. Stair, 31. Jan. 1678, Ross. — The college of Aberdeen, setting a tack of teinds, to continue, during the principal's life, and five years thereafter, with an obligation to renew the like tack, from time to time, for ever; the Lords found, That there being no sufficient onerous cause alledged for this obligation of renewing a perpetual tack, it could not be sustained in part, but that it was totally null. Stair, Gosf. 13. July 1669, Old College of Aberdeen. — Masters of a college, transacting for the benefit of the college, bind their successors in office. Stair, 10. Dec. 1675, Park. — Found, that an university may transact anent a mortification, whereof the event is uncertain and illiquid. Stair, 31. Jan. 1678, Ross.

THE office of box-master to a trade, being annual, the Lords found, That he could only discharge the yearly duties (tho' the *Powers of box-master.* deacon subscribed with him) that were due, the time of his office, unless the trade had given him an express warrant for it, on a just and onerous ground. Giln. 24. June 1664, Hammermen of Edinburgh.

THE Lords found an arrestment, laid on in the hands of the treasurer of the trades maiden-hospital, a proper arrestment, and preferred it to an arrestment afterwards laid on in the hands of the said treasurer, and also of the governors and directors of the hospital: and they also preferred an assignation, intimated in the same manner. *In legal diligence against a community, who must be cited?* 10. Jan. 1739, Competition, Creditors of Menzies.

THE office-bearers of a corporation, which has no power to borrow money, are not liable to execution for the debts that *Later decisions.* happen to be contracted. Rem. Dec.

p. 38. Cumming, 11. Jan. 1742. Home observes
11. Jan. 1744.

MAGISTRATES are not liable, as representing the community, for the delicts of a former set. Home, p. 416. Campbell, 28. Feb. 1744.

JOHN LANG, deacon of the taylor's of Selkirk, and other craftsmen, who, with Thomas Elliot late bailie there, amounted in all to the number of eighteen persons, brought a process against the magistrates and town-council of Selkirk, challenging them for embezzlement and misapplication of the town's revenues; and concluding, That they should be decreed to repay the sums, therein mentioned, to the treasurer for the time being. The defenders, without entering into the merits of the cause, insisted upon the following preliminary objections, That the pursuers had neither *title* nor *interest* to carry on this process. These objections being reported to the court, process was sustained, and the objections repelled. Upon a reclaiming petition for the defenders, the objections were sustained. The pursuers having next reclaimed, process was sustained, and the objections repelled. It lay upon the defenders now to reclaim, which was done by an elaborate petition, containing, *inter alia*, the following arguments: That the constitution of a royal burgh, among the different nations presently in Europe, was borrowed from the Romans; or rather, the constitution of such cities or burghs, as were in being during the time of the Roman power, was continued down to the present times, with some slight alterations, occasioned by the introduction of the feudal-law, and had been communicated generally to other burghs of later creation: That our town-council corresponded to their senate; we have magistrates and office-bearers as they had, differing only in names; their consul is our provost; their prætors our bailies; their ædile our dean of guild; their decurions our counsellors, &c.: That they had a common good as we have, which was understood to belong, not to the particular citizens, whether *pro diviso*, or *pro indiviso*, but to the politic or corporate body. Our notion was the same, with this addition, derived from the feudal-law, that this corporate, or politic body, was the vassal, which holds the town, with

its common-good, of the King as superior.—Hence, in the Roman law, as well as in our law, the property that belongs to a corporation, is always distinguished from the property that belongs to any burghers, l. 6. § 1. *De divis. rer.* “Universitatis sunt non singulorum, veluti quæ in civitatibus sunt theatra, et stadia, et similia, et si quæ alia sunt communia civitatum. Ideoque nec servus communis civitatis, singulorum pro parte intelligitur, sed universitatis. Et ideo tam contra civem, quam pro eo, posse servum civitatis torqueri, divi fratres rescripserunt. Ideo et libertus civitatis non habet necesse veniam edicti petere, si vocet in jus aliquem ex civibus.” Again, l. 1. § 1. *Quod. cujuscun. univers.* “Si quid universitati debetur, singulis non debetur: nec, quod debet universitas, singuli debent.”—The advising the reclaiming petition for the magistrates, was superseded. The pursuers, despairing of success, as the learned collector of this decision observes, have not thought proper, hitherto, to press for a judgment, and, probably, we shall hear no more of it. Rem. Dec. p. 181. Lang, &c. 28. Nov. 1748.

PRIVATE burghers may sue the magistrates and town-council of a royal burgh, to account for their administration of the common-good. Fac. Col. vol. I. p. 35. Anderson, &c. 30. June 1752.

THE magistrates and town-council of burghs, may grant feus of the property of a burgh, or leases, of a longer endurance than three years, providing always that the community be thereby benefited. Fac. Col. vol. I. p. 40. Dean, &c. 3. July 1752.

A VILLAGE was erected, by charter, into a burgh of barony, with power to the baron to levy certain tolls, and to apply them to the uses of the burgh; the tolls having been constantly levied, this was found an obligation to apply, altho' the clause had been omitted in the baron's charter for more than a century past. Fac. Col. vol. I. p. 188. Jaffray, Feb. 18. 1755. This was reversed on appeal.

PARTICULAR members of a public meeting, may be called to answer, *pro rata*, for the application of the public money by the meeting. Fac. Col. vol. II. p. 25. Charteris, 27. Feb. 1757.

MAGISTRATES

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MAGISTRATES, of a royal burgh, cannot accept of a composition from any one having property within the burgh, for his share of the public taxes. Fac. Col. vol. II. p. 183, Agnew. 21. Feb. 1758.

COMPENSATION. RETENTION.

*Of old not
sustained in our
practice.*

OF old, no compensation could be received by way of exception, altho' it had been *de liquido in liquidum*, but action only reserved. Balf. (Exception) Sinc. 5. May 1543, The

Queen.

*Nature of
compensation.* IN a question of compensation and recompensation, the Lords abstracted from the specialities that were pled in the case, and the dispute turned upon the general point; Whether compensation was the operation of the law, or judge? Some of the Lords were for the first, that it operated *ipso jure, eo ipso* that the parties became mutual creditors, and appealed to Stair, who lays down the rules for compensation and recompensation, as received with us, from the civil law. Others maintained, that compensation had no effect, till it was proponed and applied by the judge; that when compensation is sustained, our law, on principles of equity, gives it an operation *retro* to stop the course of annualrent, and in that sense only is the common maxim to be understood, That compensation operates *retro et ipso jure*. Upon these principles it was urged to be optional to the party to propone it or not, or to propone it upon one or other debt; and supposing one debt better secured than another, why should he not be entitled to compensate upon the debt least secure? The vote was stated in these precise words, "Whether to the party creditor in more debts, it was optional which of them to make use of by way of compensation?" and it carried in the affirmative. 15. Nov 1738, Maxwell.

RETENTION, by the intromitter with the deceased's goods,

goods, of what was left in legacy to him, and of what was furnished by him to the deceased in meat, drink, and other necessaries, a month, or thereby, before her decease, was found relevant against the executors, pursuing for these goods. Had. 24. Nov. 1609, Russel.

—A creditor having proceeded to poid, *bona fide*, not knowing of his debtor's death, in a process of restitution, at the executor's instance, compensation or retention was sustained to the poider, upon the debt due to him by the deceased, which was the foundation of the poiding. Fount. 10. Dec. 1707, Lees.

A PARTY, being charged for a debt, and alledging in a suspension, that he was cautioner in a testament, wherein the charger was executor, and was not yet relieved; the Lords ordained the charger to find caution for his relief, altho' no distress was qualified. Auch. (*Caution*) 7. Nov. 1632, Granger.

A CHARGE, upon a bond, being suspended, on this ground of retention, That the suspender was confirmed executor, to the charger's deceased spouse, and was entitled to her share of the moveables in the charger's possession, it was answered, That by act 1592, Cap. 143, liquid debts only are allowed to be pled on by way of exception. The act speaks not of compensation more than of retention; and as it is *triti juris*, that an illiquid claim cannot be offered in the way of compensation; to sustain it under the name of retention, would be truly giving it the whole effect it could have, when pled as a compensation, which would be allowing the thing, under another name. The Lords repelled the reason of suspension. 9. Dec. 1735, Crawford.

A RELICT, being executrix to her husband, and tutrix testamentary to her son, after marriage with a second husband, having charged for bygone annuity, compensation was proponed upon her intromissions as executrix and tutrix; the

Exception against payment or performance upon a liquid claim.

Exception upon a claim not liquid, but ubi est parata executio.

An illiquid claim not sustainable, either as compensation or retention.

What understood to be a liquid claim?

Lords repelled the compensation, as being an illiquid claim, which cannot compensate one that is liquid. Bruce, 9. Feb. 1715, Gordon.—An article of compensation was rejected as illiquid, being founded on a process at the instance of an executor, having only a licence to pursue, without confirmation, and no sentence recovered, nor proof led. Stair, 8. Jan. 1663, Fullerton.—A debtor being obliged to deliver a certain quantity of coals weekly, or, in case of failure, four pounds for each chalders; this sum was not found liquid to be the foundation of a compensation, not being constituted expressly as a price, but as a personal failure beyond the ordinary price, which cannot be liquidated till declarator and modification of a judge. Stair, 17. June 1664, Tulliallan, &c.—Compensation being proponed on a factor's intromissions, to elide a debt due to the factor, now in the person of an assignee; and it being answered, That there was no proof of the extent of the intromissions, and therefore, that the compensation was not liquid; the Lords found the compensation liquid, if the factor bore an obligation to do diligence: but if the factor was only liable for his actual intromissions, that the compensation could not be sustained, because it required a proof. Stair, 7. Jan. 1680, M'Bride.

THE Lords refused to receive an exception of compensation, founded upon certain by-gone teind-duties, owing by the pursuer to the compenser, because these consisted in victual, notwithstanding the defender offered to refer the debt, victual prices, &c. to the pursuer's oath. Hope, (*Compensation*) ult. Jan. 1616, Linlithgow. Dur. 1. Dec. 1626, Balbegno. Dur. 6. Dec. 1626, Campbell. The reason is, that the act 143. parl. 1592. introducing compensation, gives it only place, *de liquido in liquidum*; and therefore, regularly, compensation cannot have place in debts not yet liquid, however soon liquidable by oath, or otherwise. But in latter practice, the Lords have got over this rigorous interpretation of the act, adopting this maxim, *Quod statim liquidari potest, pro jam liquido habetur*.—Thus, a claim was received by way of compensation, tho' illiquid, offered instantly to be liquidated by oath. Fount. 13. Feb. 1711, Rols. The like, in a pursuit for payment

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ment of money, where the Lords found, That an exception of compensation proponed thus, *viz.* That the pursuer had intromitted with goods, belonging to the defender, to the value of the debt, must be verified, *instantly*, by writ or oath. Dirl. 11. Dec. 1674, Stewart.

—Compensation being proponed on a bond produced, due by the charger's father, which the suspender offered instantly to liquidate by referring to the charger's oath, that he represented his father; the Lords found the same relevant. Forb. 31. July 1707, M'Doual.—In a suit on a liquid bond, compensation was pled on a charter-party, between the pursuer and the defender's husband. The Lords decerned for payment of the bond, but superseded extract for three or four months, that, in the mean time, the defender might have opportunity to liquidate her ground of compensation, by proving that her husband had performed the voyage. Fount. 22. Nov. 1683, Seaton.—Compensation being proponed against a charge for liquid debt, on the pursuer's father's intromission with a sum of money belonging to the suspender; the Lords allowed the suspender five weeks to prove his ground of compensation. Fount. 14. Jan. 1686, Brown. A minor, who was the heir of a cautioner, being sued, and getting a day to prove payment, and then also proponing compensation of a sum not yet liquidated; the Lords, in this favourable case, and because the pursuer was delayed however, allowed the minor a term to prove his compensation. Fount. 8. Dec. 1697, Muir, &c.

COMPENSATION, like payment, may be founded on a *quocunque*. Stair, 7. Jan. 1680, M'Bride.—A tutor and his cautioner, being charged for payment of a bond granted by them, with relation to the pupil's affairs, were allowed to compensate on a debt due to the pupil by the charger. Gosf. 5. Feb. 1670; Northesk.—An heir, sued for his predecessor's debt, was allowed to compensate the same with a debt owing by the creditor to the deceased, tho' that being a moveable debt, belonged to his executors, and not to the heir, who proponed compensation. Forb. 20. Feb. 1712, Hay.—A debtor, being cautioner for the creditor in another sum, and the

creditor craving payment, it was argued, That law gave him retention, *quoad concurrentem quantitatem*, until he was relieved, because, on the faith of that debt, he became cautioner, otherwise he would not have become bound. Answered, The present case was different, since retention was craved by a creditor of that cautioner, who had not affected the relief, *speciatim et directe*. The Lords however found, that it was transmissible, and competent to the cautioner's creditor, as well as to himself; tho' it was alledged, That retention was a weaker and more personal right than compensation, because the latter, *ipso jure*, extinguishes, whereas the first is only *exceptio doli, qua persona cohaeret, non rei*. This the Lords repelled, as the law says, *Etiā ob chyrographarium debitum pignus retineri potest*. Fount. 1. July 1709, Strachan.—In a competition among creditors, compensation was sustained against an adjudger, upon a debt due by him to the common debtor, tho' it would not have been competent to the debtor himself, who neglected to propone it in the process of constitution, carried on against him by the adjudger, it being urged for the other creditors, That they were entitled to propone this compensation, during the said process of constitution, and they could not be excluded their interest by the decree in which they were not made parties, tho' here it was answered for the adjudger, That, to allow creditors to propone compensation after the debtor's privilege is at an end, in whose name they can only plead it, would be the same as allowing a creditor to reduce upon minority and lesion, after the lapse of the *quadrannium utile*. 30. June 1738, Rae, &c.

COMPENSATION was admitted against an assignee.

Against whom competent, Had. 16. Jan. 1611, Carnwath. Dur. 14. Feb. 1633, Keith; and this, tho' the debt, which was to compensate the other, was contracted after the assignation, but before intimation thereof. Hope (*Compensation*) 20. Dec. 1614, Ogilvie.—A master being sued

by a tenant's onerous assignee, his compensation was sustained, tho' upon a decree against the cedent, posterior to the assignation, the decree being for bygone farms long before the assignation. Dur. 11. Jan. 1627, Paton.

A MAN

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A MAN, being first debtor, and thereafter becoming cautioner, for his creditor in a bond, for the like sum, bearing a clause of relief, and the creditor having, after the cautionry, assigned the bond, and it being intimated, the Lords sustained compensation and retention, in respect that the compenser was creditor by the clause of relief, prior to intimation of the assignation. *Harc. (Compensation)* Jan. 1683; Sibbald. Home; Dec. 1684, *Scrimzeour*.—The like; Dur. 15. Nov. 1627, Black. Forb. 14. Feb. 1708. Fount. 1. July 1709, Strachan.—An assignee to a tack, suing for the rent, the tenant pled, That he had become cautioner for his master in a bond, on the faith of retaining his tack-duty for his relief; the Lords found, That this did not operate against an assignee. Fount. Forb. 26. Feb. 1709, Bowhill.

2do, *If retention be good against an assignee?*

A FATHER, taking a bond to himself, and, failing of him by decease, to a younger son *nominatim*; the son, after the father's decease, got a bond of corroboration from the debtor, and charging thereupon, compensation was proponed against him, on a debt due by the father to the suspender, before granting the bond of corroboration. The Lords found the compensation not receivable in this case, partly, in respect it was understood past from, by granting the bond of corroboration, and partly because the charger was not liable for his father's debts, until his other heirs were discussed. Fount. 18. Dec. 1696; Robertsons.

3tio, *If proponable against an heir who has the benefit of discussion?*

FOUND, that a legator, *eo ipso*, that the executor is confirmed, becomes his creditor, and may compensate a debt owing by him to the executor; nor is it sufficient to stop compensation, that the legator has not obtained decree against the executor, tho' it may be that nothing will be due to him of his legacy; or at least not all, if the testament be exhausted. Spot. (*Executor*) 12. Nov. 1628, Williamson.—Compensation being proponed against one of four co-executors, it was alledged, That it could not take

4to, *If against executor?*

place but for the fourth part. It was found, that compensation, being equivalent to a discharge, taking away the debt *ipso jure*, it might be proponed against any of the executors *ipso jure*. Stair, 15. June 1666, Stevenson.—Compensation against the executor is not competent to a debtor of the deceased, taking assignation to one of the deceased's debts, after his death, but he will, in competition with other creditors, be in the same situation with his cedent, as if no such assignation had been made. Stair, Gilm, 14. Feb. 1662. Executors of Mouswal.—The like; Stair, 8. Feb. 1662, Crawford.—The Lords, having reduced a posterior confirmation of a creditor, because the relict had already obtained herself confirmed; and she next suing him for restitution of some of the deceased's goods, which he had poinded by virtue of his said title, this was found null; yet the Lords allowed him compensation on the debt due him by the deceased. Fount. 10. Dec. 1707, Lees.

A TENANT, having paid up his rent to his master for eight or ten years, and the minister's stipend standing out unpaid all that time, was found to have retention of a term's rent, confirmed by the executor-creditor, after the proprietor's

5to, If against an executor-creditor?

decease, until he should be relieved at the hands of the minister. Marc. (Escheat) March 1685, McReith.

—The Lords sustained compensation against an executor-creditor, on payment of a cautionry debt, tho' the distress was after the confirmation. Fount. 13. Feb. 1679, Carsewel.

THE Lords refused compensation, because the proposer had taken assignation to the debt,

6to, If against an arrester?

after arrestment was laid on in his hands, which tended to gratify one creditor in prejudice of the lawful dis-

higence of others. Fount. 19. July 1678, Warrock.

ARRESTMENT being laid on, affecting bear, purchased by the arrestee and common

7mo, Retention, if good against an arrester?

debtor, retention was sustained against the arrester, until the arrestee should be relieved of the price of the common debtor's half. Fount. 24. Dec. 1679, Creditors of Gordon.

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IN a special declarator, at a donatar's instance, against a debtor of the rebel, the Lords found, That compensation was proportionable against the donatar, so as to meet this action, as if it had been objected against the rebel himself. Dur. 26. July 1622, Davidson. Dur. 3. March 1629, Fletcher. Gosh. 23. Jan. 1669, Drummond.

RETENTION of a debt due to a rebel at the horn, is competent to the debtor against the donatar, on account of the debtor's being cautioner and under distress for another debt, due by the rebel before his rebellion. Spot. (*Eſcheat*). Dur. 3. Feb. 1635, Innes.—A donatar of *escheat*, after general declarator, insisting in a special declarator for certain teind-bolls, owing by the defender to the rebel, retention was sustained upon a liquid debt due by the rebel to the defender before the rebellion. Dur. 24. Feb. 1635, Halgreen.

AN assignee who, by a back-bond, stood bound to apply the contents of the assignation when recovered, for payment of certain debts, wherein he was cautioner for the cedent, having thereafter become creditor, by progress, to his cedent in a pure debt, compensation was opposed to him on the contents of the said assignation, now uplifted. The Lords found, That the contents of the assignation, destinated for relieving the assignee of his cautionry, could not be apply'd by the cedent to other purposes, such as to sopite a separate debt by compensation. Dalr. 8. Dec. 1699, Douglas.

A FACTOR cannot retain or compensate his intrómissions, by any of his constituents debts assigned to him after his intrómissions. Stair, 9. Nov. 1672, Pierson. Fount. 24. July 1678, Douglas.

A PARTY, having got assignation to an adjudication, and.

8vo, Compensation, if good against a donatar of escheat?

9no, Retention, if good against a donatar of escheat?

Where the debt upon which compensation is proposed, is destinated to certain purposes.

Compensation or retention, if good against an actio mandati?

If good against an actio depositi?

and given his back-bond, either to pay or denude, and he, when sued on the back-bond, pretending to retain, till he was satisfied, of a plain liquid bond made to him by the granter of the assignation; the Lords considered that this was a trust, and that *redde depositum* was *juris gentium*, and that compensation was neither competent nor receivable against a *depositum*: therefore they repelled the compensation. Pount. 23. Feb. 1697, Scot.—A person having disposed his estate to two of his friends, under trust, for certain uses, with this quality, That what remained thereof, after payment of his debts and legacies, should be equally divided between his two brothers; and one of the brothers chancing to die after the disposer, before execution of his will by the trustees, who afterwards lodged the surplus of the free gear in the hands of the surviving brother, to be kept and made forthcoming by him to such as should be found to have best right; the Lords found, That the depositor, who was creditor to his brother, last deceased, in a liquid bond, could not detain the deposited money, for payment of his debt, in a competition with other creditors that had confirmed the subject as executors-creditors to the deceased. Forb. 16. July 1709, Creditors of Stewart.

A REVERSER having consigned the wadset sum upon an order of redemption, the same was decreed to be delivered up to an appriser of the wadset lands, and was found not compensated by a separate liquid claim owing by the wadsetter to the reverser, because no compensation

Real and personal debts, if mutually compensable?

can be between an heritable right and moveable sum. Dur. Spot. (*Redemption*) 25. March 1629, Buccleugh.—Found, that an infeftment cannot be compensated with a personal debt. Gilm. Feb. 1662, Whitekirk.—In an infeftment of annualrent, according to the new form, where there is both a subsisting personal obligation, and an accessory infeftment in security, compensation was not admitted against a singular successor, unless upon debts due by the cedent before infeftment, when the bond was merely personal. Stair, 8. July 1680, Rankin.

kin. Home, Feb. 1682, *inter eosd.*—The bygonies of an infestment of annualrent are moveable, and therefore compensable by any liquid debt of the annualrenter, even against a singular successor in the annualrent-right. Stair, 2. Jan. 1667, Oliphant.—Compensation may be proponed upon sums whereon apprising is led; because apprising is but an accessory security, a *pignus*, and does not absorb the debt. Stair, 18. June 1675, Leyes. Stair, 12. Nov. 1675, Home.—But compensation was not sustained upon a wadset, which contained a clause of requisition, because, until requisition, there was no debt. *Ibid.*—The Lords sustained compensation of the sums in an adjudication, by extrinsic intromissions and debts otherwise due, as well as by intromission with the rents of the lands, so as to extinguish the adjudication, these debts existing before expiry of the legal of the adjudication. Home, March 1682, Saline.—Intromission with a debtor's executry sustained to extinguish an apprising of his lands. Harc. (*Comprising*) 17. March 1682 Baillie.—Found, that a moveable bond might compensate and extinguish an heritable one by decree of comprising, but not *contra*, unless it were loosed and made moveable by a requisition or charge. Fount. 13. Jan. 1697, Daes. Dur. 14. Feb. 1633, Keith.—A liquid sum for a house-maill, cannot be suspended upon compensation, founded upon the tenant's right of retention of any annualrent, wherein he is infest forth of the tenement, having no decree for pointing the ground, nor personal liquid decree against the heritor or liferenter. *Ibid.* 4. June 1611, Hamilton.

THE Lords refused to admit compensation, by way of suspension, tho' instantly verified, when it was not proponed before sentence, tho' the suspender had then compared, but proponed it not: and this conform to 141. act, 12. parl. James

Compensation or retention not proponable after decree.

Dur. 1. Dec. 1626, Stormount. *Compensation* not. (*Compensation*) Stormount. Auch. (*Compensation*) Feb. 1632, Walker. Fount. 5. Dec. 1710, Nath. But this does not hold as to decrees of baron-courts. Gilm. June 1662, Earl Marischal.—Compensation, not even receivable against decrees in absence, unless where made null, and turned into a libel. Stair,

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25. July 1676, Wright, Stair, Fount. 5. Feb. 1678, Logan.—And still further, a party in a suspension of a decree *in foro*, having proponed compensation, which had emerged after the decree; so that here it was not industriously omitted to be proponed, *prima instantia animo protelandi litem*; the Lords, nevertheless, found the statute general, and repelled the compensation. Fount. 9. July 1697, Gordon. 29. June 1739, Anderson.—But compensation being proponed after a decree in absence, the decree being against him, among many others, the Lords found, That a decree in absence against debtor, excludes not compensation. Forb. 20. Fount. 21. March 1707, Corbet.

A DEFENDER, who was barred from pleading compensation, in the second instance, by way of suspension, turned his defence into the form of retention, alledging that the charger was bankrupt, and therefore, on the suspender's making payment, that the charger should be bound to find caution to be law-biding for the counterclaim; which the Lords found relevant. Hare. (Compensation) Jan. 1683, Barclay. 18. Feb. 1736, M'Clara.

THE Lords sustained compensation by way of execution, altho' it could not be pursued by way of action, the ground of the compensation being long since prescribed. Fount. 31. Jan. 1705, Gordon. Forb. 20. Fount. 21. March 1707, Corbet.

Compensation not proponable upon a debt spite by 40 years prescription, tho' there was a *concurfus debiti et crediti*, long before the running of prescription. Hare. July 1719, Carmichael.

COMPENSATION proponed by a debtor against an assignee, was found not relevant, being upon a debt of the cedent's, purchased indeed by the debtor before the death of the assignee's right, but not intimated to the cedent, till he was entirely denuded by his assignee's intimation to the debtor. Stair, 22. Jan. 1666, Wallace. The like; Dirl. 12. Dec. 1665, Ferguson. Stair, Dirl. 4. July 1676, Rollo. The contrary has been found. Dur. 16. March 1639, Forsyth.—An *in tromina*

Unless the charger be ver-gens ad inopiam.

Compensation on a prescribed debt.

Ubi non est concurfus?

promitter with a rebel's corns, being sued by the king's donatar to the single escheat, the Lords refused to sustain any compensation at his instance, as being creditor to the rebel; especially, because at the time of the introduction, the party was already rebel, and so the introduction was with that which was the king's, and so could not be retained as pertaining to the rebel. Spot. (Escheat) 20. Jan. 1629, Rofs. — The debtor of a rebel, taking assignation, and intimating before his escheat is gifted and declared, may compensate against the donatar, but not after it. Fount. 1. Jan. 1679, Dickson. — A claim, not liquidated by sentence, before apprising, was found not to compensate to the prejudice of the appriser. Falc. 22. Nov. 1683, M'Brair. — An adjudger infest, suing for maills and duties, compensation was not sustained to the tenant on a debt due him by his master against whom the adjudication was led. Fount. 6. Nov. 1697. Creditors of Clark. — In a process of maills and duties, at the instance of an annualrenter against the tacksman, the defence, as to the bygone rents falling due before citation, was compensation by an equivalent sum, that his master was due him by bond. It was agreed, that the tacksman would have been safe, had he paid up these rents before citation; and from thence it was argued for him, That compensation operates *ipso jure*, which brings this case to the same with actual payment. It was answered, That compensation operates not till it be proponed, and tho' it might have been proponed against the master, it cannot now be proponed against the annualrenter, after citation in the maills and duties, he having a real right to the ground, more than against a singular successor infest in the property. The Lords found, That compensation cannot be sustained against a prior infestment for bygone rents, the same being *irreversible*. 19. Dec. 1733. Annuitants of the York-building company. — Compensation on a debt due by the tacksman to his sub-tenant, was found competent to be proponed against the master, compensation being payment in law. Falm. 13. Feb. 1664, Hodge. — An assignee to a tack, suing the tenant for the rent, and he proponing compensation, first, That his master owed him a sum *per bonds*; and then, That he was caution for him in another sum, wherein he had engaged, in hopes of retaining his tack-duty,

duty, for his relief; the Lords found, That the intimation of the assignation, interrupted the compensation for the subsequent current years that fell due after the said intimation, but, as to years preceding, they found, That the compensation took place, because of the *concurfus debiti et crediti*. Fount. 25. Forb. 26. Feb. 1709, Bowhill.—A debtor, being charged for payment of a liquid sum, suspended upon compensation, condescending on rents due by the charger as tenant to the proprietor of the land, from whom the suspender had a factory to uplift his rents; the Lords repelled the ground of compensation, because the debt on which compensation was craved, was not due to the suspender, *proprio nomine*. Forb. 27. Fount. 28. Dec. 1711, Fergusson.—Compensation of a bond of borrowed money, was refused to be sustained to the granters, upon a debt due by the creditor to their pupil, which they had no right to, altho' they offered to prove, by his oath, that they borrowed the money from him, upon the pupil's account; and that the pupil, now major, was content to apply her debt to extinguish the bond. Forb. 29. June 1711, Eliot.—Compensation found relevant against a gratuitous assignee, tho' the liquidation thereof was after the intimation. Stair, 18. Jan. 1676, Crockett.—A party assigned a debt to his son-in-law, and the debtor, when charged, suspended on compensation, he having acquired right to a debt due by the cedent; only here the cedent was denounced, and the assignation intimated before the suspender acquired right to his ground of compensation. The Lords found, That the compensation could not meet the assignee, without prejudice of reducing the assignation, on the act 1621. Fount. 23. Jan. 1711, Alison.—A man, being sued for a sum contained in his ticket, granted to one who was his factor beyond the seas, and alledging, that the said factor had much more goods of his in his hands than would compensate the debt; this was refused to be sustained, unless he would alledge, That the factor had sold the goods, and had the prices in his hands. Dur. 1. July 1631, Eliot.

Effect of compensation.

COMPENSATION being sustained on a decree, liquidating a quantity of victual, due by the charger to the suspender, the same was found to operate from the time

time the victual became due, and was not restricted to the date of the decree. Stair, Gosf. 5. Feb. 1669, Cleland.—The question occurring, *a quo tempore* compensation should take effect, whether only from the date of the sentence, by which the claim is liquidated, or from the time it became originally due? It was found, That money may be compensated by debursments of money from the time of debursement or intromission with money-rent, but not by victual or any prestation, until the same be liquidated or reduced into money. Dirl. 3. Stair, 4. Dec. 1675, Watton.—A debtor, opposing compensation to an assignee on a claim of warrandice incurred by the cedent, the compensation was found not to take place from the time the warrandice was incurred, but only from the liquidation thereof. Stair, Gosf. 23. July 1675, Cruickshank.—A man, for security of a sum, due by heritable bond, getting a tack of some lands, for a duty equal to the annualrent of the sums at six *per cent.* and being, besides, obliged to pay yearly, two wedders, and two stones of butter, during the twenty one years the tack was to last, and he never having paid these; in a declarator of extinction and payment, the Lords having first caused liquidate the prices of the wedders and butter, did then find, that they could only compensate and impute from the time of the liquidation, and not yearly when they fell due. Fount. 22. Forb. 23. Nov. 1711, Murray.—The price of spulzied goods found to compensate and sist the course of annualrents of a debt due to the spulzier, from the time of the liquidation, and not from the time of committing the spulzie. Harc. (*Compensation*) 2. Feb. 1687, Wemyss.—A nobleman's commissioners having compted with his factor, struck a balance upon the whole, except as to six articles, which were kept open to be adjusted with the constituent himself, and accordingly a docquet is adjected to the accompt, with a reservation of these articles, which were not liquidated till about ten years thereafter; the factor now insisting for payment of a bond due to him by his constituent, it was found, That the sited accompt, bearing the foresaid reservation, was not a liquid ground of debt, upon which compensation could be sustained, seeing reserved articles, some of which were sustained, fell to have entred into that

account to diminish the balance ; and therefore, sustained compensation from the date of the total clearance only. Jan. 1733, Graham.

May be past from before decree. BEFORE litiſcontestation, or decree, the defender may pass from his defence of compensation, so as to be at liberty to use the writ upon which he compenses to any other purpose. Stair, 14. July 1664, Balmerino.

If sustainable to save an irritancy from being incurred ? COMPENSATION sustain'd to purge an irritant clause. Had. 17. July 1625, Touch. The contrary ; Stair, Fount, 26. July 1678, Pourie.

Effect of retention. A DEBTOR, who stood also bound for his creditor in greater sums, refused to pay, unless he was relieved of his whole engagements ; The Lords found the defender liable to apply the sum, wherein he was debtor, for payment of the debts for which he stood bound, but gave him his option to pay one or other, as he thought proper, so far as the sum in question would extend, and that at the sight of the Lord Ordinary. June 1729, Marquiss of Clidſdale.

Recompensation. IN a suspension of a charge on a bond, the suspender craving compensation of a sum due to him by the charger *per bill*, and the charger proposing recompensation, because he was cautioner for the suspender in a bond for a greater sum, and therefore, that he must have retention of the sum in the bill till he be relieved, tho' the charger was not yet distressed ; the Lords found, That the retention took place against the liquid compensation, and that he was not bound to let the debt be extinguished by compensation, till he was relieved of his cautionry. Fount. 10. July 1711, Irvine.

Later decisions. RETENTION is competent against an administrator in England, suing in Scotland, for a debt which was due to the deceased, upon account of counter-claims against the deceased ; but is not competent against such administrator suing for a debt due to herself. Fac. Col. vol. II. p. 161. Burghs, 11. July 1754. The first part was reversed on appeal.

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IN 1718, James Graham set a tack of the half of his lands of Longboddom for 21 years, at the rent of 300 merks, to his brother Captain William Graham; who, in 1723, assigned the same to William Carruthers; and, at the date of the assignation, Longboddom gave an heritable bond to William Carruthers for 4200 merks, payable at the term of Whitsun. 1739, when the tack was to expire, with an obligation, to infect him in an annualrent of 210 merks, out of the above lands, redeemable at the said term; declaring, "That it should be lawful to Carruthers, to retain the said yearly annualrent of 210 merks, out of the first and readiest of the said tack-duty." This tack, and heritable bond, was thereafter assigned to George Carruthers, the defender. Longboddom's affairs having gone into disorder, his estate was sold by trustees for his creditors in 1732, to Edward Cutler; who objected to the sale on account of incumbrances, and, in the meantime, declined to receive payment from the defender of the surplus tack-duty over his annualrents. These disputes continued many years with Edward Cutler, and James Campbell, his representative. At last, in 1752, Mr Campbell was found liable in payment of the price and annualrents; and, in the after decree of ranking of Longboddom's creditors, George Carruthers was ranked for the principal sum of 4200 merks, due to him by the above heritable bond 1718. The purchaser insisted, That the superplus of the tack-duty over the annualrents, being a clear liquid debt due by him, ought to be imputed yearly, as they fell due, in extinction of the principal sum of 4200 merks, and another personal debt due to him by Longboddom. The Lords, 28. Feb. 1756, found, That the surplus rents, owing by George Carruthers, after deducting the annualrents of the debts in his person, ought to be yearly applied in extinction of the said debts. Pleaded in a reclaiming petition for George Carruthers, That by the clause, in the heritable bond, the tenant was allowed to retain the annualrents out of the tack-duty; but he could not retain the superplus rent for payment of the principal sum, which was not due till the expiry of the tack: And as he could not plead compensation, or pretend to retain the rents for payment of his principal sum, it can as little be competent to the heritor or purchaser to plead it against him. Compensation must in all cases be mutual, and competent to

both parties, or neither. The tenant was bound to pay the surplus of his rent upon demand, without compensating or retaining; and it would be unjust to make him pay interest for such sums, which he was bound to have ready on demand, or to impute them yearly in extinction of his heritable bond, which is equal to making him pay interest for the same. Answered for James Campbell, That the clause, allowing the tenant to retain his rent for payment of the annualrents, would have been implied, tho' not expressed, and cannot infer a passing from compensation *quoad ultra*: And in all cases, where two debts concur, tho' one of them bears no interest, yet compensation operates *retro*, so as to stop the interest upon the other debt from the time of the concurrence. The Lords found, That the surplus rents, after deduction of the annualrent's due to the petitioner, can only apply in extinction of the debts in his person, as at the date of the decree of ranking. Fac. Col. vol. II. p. 73. Campbel, July 23. 1757.

AN heir, succeeding to an entailed estate, being sued by the executors of the former heir, may plead retention against them for debts, of which the deceased was bound to relieve the estate; but cannot plead it against his creditors. Fac. Col. vol. II. p. 101. Gordon. 1. Dec. 1757.

A CREDITOR, intrusted with the keys of his debtor's house, and an inventory of his furniture, &c. found not to have any right of impignoration or retention in these effects. Fac. Col. vol. II. p. 471. Competition of Appine's Creditors. 10. Dec. 1760.

RETENTION that arises from the nature of a mutual contract. See *Mutual contract*.

RETENTION against tutors and curators and their assignees, ante redditas rationes. See *Payment*.

RETENTION by an executor for debts due to himself. Ibid.

RETENTION against a factor's assignee. Ibid,

Compensation.

WHEN money is put into the hand of a mandatary, to be applied for a certain purpose, the
Later decisions, death of the mandant, before the application, entitles the mandatary to retain

tain the money, in compensation of debt due to him by the mandant. Rem. Dec. p. 82. Creditors of Murray, 19. June 1744.

A MAN, obtaining possession, *bona fide*, of his debtors effects, tho' by an informal pointing, is not bound to restore till he get payment of his debt. Rem. Dec. p. 102. Creditors of Glendinning, 8. June 1745.

COMPENSATION may be proponed, even after a decree, by way of retention, where the party has no other means of obtaining payment. Rem. Dec. p. 199. Caithness, 17. Feb. 1749.

A DEBTOR, having left money to his creditor, on bond, and continuing to pay the annualrents of the debt, which he owed, without deducting the interest of the sum he had lent, may, notwithstanding, plead compensation upon that sum, in a competition with creditors. Fac. Col. vol. I. p. 126. Haldane, 31. July 1753.

TENANTS, who had paid to their master, and were decerned to pay to the creditor-arrester, having continued to possess for subsequent years, and these subsequent rents being arrested, the tenants were not found entitled to plead retention against the said arresters, on account of the debt which became due to the tenants by the master, because of the double payment, which they had made of the rents attached by the first arresters: Here the second arrestment was prior to the second payment of the former rents. Fac. Col. vol. I. p. 303. Miller, 10. July 1756.

BY contract of marriage, dated 2. September 1698, between Duncan Graham of Ledhart, and Anne Colquhoun, the said Duncan Graham as principal, and Thomas Graham of Deuchry as cautioner, became bound to provide 5000 merks to the said Duncan Graham himself, and Anne Colquhoun his wife, in conjunct-fee and liferent, and to the heirs of the marriage in fee. Duncan Graham, the husband, died about Martinmas 1705; and, in 1714, his widow, Anne Colquhoun, married Alexander M'Pherson of Crigie, and lived till Whitsunday 1739. The liferent-provision, settled upon Anne Colquhoun, in her first contract, not being regularly paid, Alexander M'Pherson, her second husband, did, after her death, enter into a submission with Patrick Graham, the son of Duncan of Ledhart, and Thomas Graham, the son of Graham of Deuchry, the cautioner..

tioner. In consequence of this submission, a decree-arbitral was pronounced, finding Patrick and Thomas Graham liable to Alexander M'Pherson in a certain sum, as the balance of the jointure remaining due to his wife at the time of her death; but as, in the proceedings during the course of the submission, the said Patrick and Thomas Graham, had pleaded upon arrestments used in their hands by George M'Farlane of Fafland, who had brought an action against Alexander M'Pherson, for payment of two bonds granted by his wife, upon the 6. February 1714, the arbiters found, That, before demanding payment, Alexander M'Pherson should be obliged to loose these arrestments in common form. Alexander M'Pherson purified this condition of the decree-arbitral, by loosing the arrestments; and having charged Patrick and Thomas Graham for payment of the sums thereby awarded, they suspended the charge, upon this ground, That, having acquired right from George M'Farlane, to the two bonds granted by Anne Colquhoun, upon the 6. of February 1714, they were entitled to plead compensation upon these bonds. Alexander M'Pherson assigned his ground of action to Robert M'Pherson, clerk to the trustees for improving fisheries and manufactures, who, in answer to the above plea of compensation, insisted, *1mo*, That the said debts, not being constituted, even against Alexander M'Pherson, they were illiquid *quoad* Robert his assignee; and therefore could not compensate a clear and liquid claim at his instance. *2do*, That the bonds, bearing annualrent by their conception, were, in their nature, heritable, *quoad* the husband, who, on that account, could not be made liable after the dissolution of the marriage. And, *3^{tie}*, That, at any rate, both bonds were cut off by the negative prescription.— Answered for the suspenders: *1mo*, The statute, whereby it is provided that compensation is not pleadable in the second instance, does not apply to suspension of charges founded upon decrees-arbitral, which are of the nature of contracts, rather than of judicial proceedings. Besides, the compensation, in this case, was not pleadable when the submission depended, the bonds having only come into the person of the suspender, Patrick Graham, after the decree-arbitral was pronounced; and,

and, even considering the decree-arbitral as the decree of a judge, the compensation pleaded would fall to be admitted; because, if it were to be repelled, the debts, whereon it was founded, would be totally lost by the death of Alexander M'Pherson and Anne Colquhoun, neither of whom left any funds behind them. *2do*, The bygone annualrents, which are now more than double the principal sum in the two bonds, are moveable to every effect; and, as the principal sums themselves must have affected the husband, while the marriage subsisted, at least, to the extent of the wife's funds, so, the dissolution of the marriage could make no difference, as the sum charged for, against which the compensation is pleaded, consists of effects originally due to her, and only belonging to the husband *juri mariti*, agreeable to a decision, observed by Lord Stair, 1. Feb. 1662, Cunningham *contra* Dalmahoy. *3tio*, The bonds are not liable to the negative prescription, in respect that a summons, for payment thereof, had been brought against Alexander M'Pherson, upon the 10. January 1754, upon which letters of arrestment had been raised and executed against Patrick Graham, one of the suspenders. Nor is it of any consequence, that this summons was neither called nor renewed within the seven years. By the 29. act of the 5. parl. of King James III. introducing prescription into the law of this country, no more was required, than that the party, to whom an obligation was granted, should follow that obligation, within the space of 40 years, and take document thereupon: And, altho' the act 1669 declares, "That all citations that shall be made use of for interruptions, whether in real or personal rights, be renewed every seven years, otherways to prescribe;" yet this act does not apply to citations upon a summons for payment, which, however they may have the effect of interrupting prescription, cannot be said to be made use of for that purpose. Besides, supposing some judicial procedure necessary, in order to the full interruption of a prescription, without the necessity of renewing the summons every seven years, such judicial procedure was had in this case as must necessarily have that effect; because, not only an arrestment was obtained upon the depending action, created by the execution of the summons,

mons, but likewise this arrestment was founded upon in the procedure before the arbiter, and was by him ordered to be loosed, before payment of the sums decerned for could be demanded. The Lords found the letters orderly proceeded. Fac. Col. vol. III. p. 312. McPherson, 15. Feb. 1764.

C O M P E T E N T.

Decree cannot be taken away but by reduction.

A DECREE of an inferior judge, pronounced on the liquidation of prices without probation, was found null, without necessity of reduction. Ersk. 4. Nov. 1593. — Found, That a decree of the Lords, cannot be taken away by exception, altho' pronounced manifestly against the act of parliament. Colv. May 1582, Douglas. — A decree, pronounced against a party absent, *rei publicæ causa*, was found not to be *ipso jure* null, but that it must abide the course of a reduction. Had. 26. Nov. 1594, Morton. — A writ, being reduced for not production, it was found, That the decree cannot thereafter be taken away by the party's comparing and offering to produce, and abide by the writ, alledging, that the not production was thro' his tutor's fault, when he was minor; but found, That he behoved to reduce it as accords. Had. 15. June 1605, Miller. — A decree, against a minor, as lawfully charged to enter heir, being suspended on production of a renunciation; the Lords found, That this renunciation might yet be received by way of suspension, without necessity of a reduction. Dur. 25. Jan. 1628, Kennedy. A nullity proponed by way of reply, was refused to be sustained against a standing decree, altho' the nullity was, That it proceeded on an infeftment of kirk-lands not confirmed, which can produce neither action nor exception. Dur. 24. Nov. 1632, Hynd.

THE Lords refused to take away a standing comprising, *ope exceptionis*; tho' it was for an heritable debt, never made moveable by a charge. Spotif. (Comprising) 24. Feb. 1627, Couper. Spotif. (Comprising);

prising) 10. July 1634, Balmerino.—An adjudication being challenged, as following upon a charge to enter heir, the person charged, not being the nearest heir; this was found competent; to the nearer apparent heir, without reduction, tho' infestment had past on the adjudication. Stair, 10. July 1662, Ker.

A PARTY being decerned executor-dative, *qua* nearest of kin, when there was a nearer; the Lords found, That his title, in a *Decree-dative*. process, at his instance, against the deceased's debtors, was not quarrelable; summarily, before the Lords, upon the act 26. par. 1690, by the nearest of kin compearing for his interest, but that he must first apply to the commissaries for reduction of the decree-dative, and preference. Forb. 6. Dec. 1709, Hamilton.—A deceased's only child pursuing her step-mother, as executrix for her bairns part, *viz.* the third of all; the Lords sustained this action, altho' there was a standing confirmed testament, where the division was only made bipartite: but they found no necessity of reduction here, because the daughter was not called to the said confirmation. Dur. 27. Feb. 1627, Ross.—The debtor of a deceased, assailed in a suit, at the executor's instance, by compensation upon a debt due to him by the deceased, being reconvened on the same account, by another executor, who offered to improve, *incidenter*, the execution of the edict whereon the first confirmation proceeded; the Lords found, That the defender was not obliged to abide by the verity of the execution, and that improbation was not competent in that state of the process. Forb. 10. Dec. 1707, Lees.

AN exception, in a declarator of bastardy, was sustained, being founded on the service of an heir to the alledged bastard, which being a standing sentence, the Lords found sufficient to elide the gift, so long as it stood unreduced: and this was found, altho' the service was not retoured, nor past the chancery, and altho' it should never be retoured, the person having died shortly after the service. Dur. 22. July 1626, McCulloch.—One being retoured heir to his grandfather, and charging the superior to enter him; the Lords found, That the superior ought to comply therewith, tho', at calling the suspension, comparance was made for

for the father's assignee, who alledged, That the father was infest as heir to the grand-father, and had disposed to him, all which he instantly verified: but this was not found receivable, *hoc loco*, because the grand-son's retour was a standing sentence, and therefore behoved to be reduced in common form, tho' this objection would have been sufficient to stop the service. Dur. 14. Dec. 1627, Beg.—In a like case, the father's assignee being in a reduction of the retour, it was objected, That the retour could not be taken away by a simple reduction; that it behoved to be by a summons of error, for reducing the service by an inquest of error, to be pursued in Latin, by a precept out of the chancery. Answered, No necessity for this form, unless there was a nearer heir, which would make the service erroneous; but here the inquest did their duty, seeing the grand-father's infestment was produced to them, and no infestment denuding him. The Lords found the reduction receivable *hoc ordine*. Stair, 7. July 1663, Mow.—Yet thereafter, a donatar of forfeiture having obtained a warrant for retouring the rebel, after being five years in possession of certain lands, and the inquest having served *negative*; in a reduction of the retour, as contrary to the testimonies of the witnesses adduced, it was found no process, because the reduction of retours is competent only by a summons of error; tho' the custom had been, of a long time before, to sustain simple reductions, where the design is only to reduce the retour, without insisting against the assizers for their error. Stair, 28. June 1667, Home.—The reduction of a retour may now be by an ordinary summons, without necessity of a precept out of the chancery in Latin under the quarter seal; and the act of sederunt, in 1633, is now in desuetude. Fount. 20. July 1680, —A brother, retoured heir to his father in an annualrent, was preferred to his sister, who had been before retoured heir in the same, when he was abroad, and without necessity of reduction. Dur. 16. Feb. 1627, Colvil.—A daughter being retoured heir to her father, and another being thereafter settled and retoured as son and heir to him; and the daughter craving preference, in respect of her sentence, alledging, That her brother was dead before the service, and that the procuratory

was counterfeit; the Lords, notwithstanding her decree, found, That if the son's procurators would offer to prove that he was in life at the time of his service, they would prefer him; and found no necessity to reduce the daughter's retour, or decree. Dur. 2. Feb. 1632, Muirhead.—A younger brother being served, before an inferior judge, heir to his immediate elder brother; but thereafter, the eldest desiring to be served heir of conquest, and the judge demurring, because of the former service; the Lords allowed the eldest to advocate upon iniquity to the maters; and found, That not being called to the service, he ought not to be prejudged thereby, nor put to the charges of a reduction, Dirl. 4. Jan. 1677, Mitchelson.—A deceased person of quality's second brother, being abroad at his decease, and the third brother serving himself tutor-in-law to the deceased's children; but the second brother returning home, and taking out brieves for serving himself tutor thereon; upon a summary petition to the Lords, by the third brother, bearing, That *tutorem habenti, tutor dari non potest*; and that having been long in possession, his gift must be reduced and the other prove that he was elder brother; the Lords, considering that this was *notorium, quod non eget probatione*, and that the tutory was, *ipso jure*, null, and needed no reduction, they summarily annulled it, and ordained the second brother's brief to go on. Fount. 26. July 1688, Ramsay.

THE preferable creditor, tho' cited, neglecting to appear in a multiple-poining, another creditor obtained decree of preference; the preferable creditor raised a second suspension, and multiple-poining, in the tenants names; the Lords found, That it was not competent for him to quarrel the decree in this form, but, that he must necessarily insist in a reduction, according to act of parl. 1584, Cap. 3. Stair, 1. Feb. 1670, Watson.

FOUND, That no exception of iniquity, nullity, &c. can be proponed against a decree-arbitral, a reduction being only competent. Balf. (*Arbitration*) 11. Feb. 1540, Hamilton.

FOUND, That a horning cannot be taken away by exception.

Decree of preference upon a multiple-poining,

Decree arbitral.

Objections against a horning, if proponable by exception?

exception. Mait. 1590, Commendator of Kilwinning. Colv. July 1583, Logan.—In a declarator of escheat, the Lords refused to receive an alledgeance, that the party dwelt *alibi* at the time of the charge, than where the execution did bear him to have dwelt, by way of exception, but reserved to him, reduction of the horning. Dur. 14. Dec. 1621, Winton. Stair, 22. July 1662, Montgomery. Fount. 18. June 1712, Scot. Spotis. (*Horning*) 11. Jan. 1629, Galloway.—In a declarator of escheat, it was found not enough to except, that, before denunciation, the debt was paid and discharged, but the horning behoved to abide a reduction, to which the officers of state must be called, because the rebel and creditor might collude in prejudice of the fisk, by antedating the discharge. Spotis. (*Escheat*) Dur. 30. Nov. 1630, Douglas. A horning was found null, even by exception, being upon an act of the kirk-session, for a contribution to a school-master, because the party was neither cited, nor did consent thereto. Hope, (*Horning*) 23. June 1625, Somervell.—In a special declarator of escheat, the Lords found an exception of nullity against the horning relevant, *viz.* That the charger was to find caution in a lawburrows; caution being really found, before denunciation, and within the days of the charge, all which being instantly verified, the horning was found null, notwithstanding the sentence of general declarator. Dur. 29. Nov. 1626, Smetoun.

IT being objected to the pursuer's infestment, That

Objections against a standing infestment, how proponable?

it was null, as proceeding upon a retour, whereby the pursuer was served heir before a sheriff, within whose jurisdiction the lands did not lie; this objection was not received by way of exception, but reserved to reduction. Dur. *penult.* July 1628, Martin.—An alledgeance, that a sasine is null, because the person signing it as notary, was never admitted regularly to that office, cannot be received in a multiple-poining, but must be sued by way of action. Dur. 26. June 1634, Johnston.—A sasine given to an heir, upon his retour,

your, by a wrong superior, cannot be taken away by exception or reply. Had. *penult.* Jan. 1612, Arthur.

AN inhibition, being executed against a person living within a regality, not at the head burgh thereof, nor registred there, but at the head burgh of the shire; The Lords refused to receive the alledge-
Objections against an inhibition.
 ance by way of exception; but reduction, *prout de jure*, was reserved to the party. Dur. 25. July 1628, Stirling.

A RIGHT, by infestment, granted contrary to the act of parliament 1621, cannot be challenged by exception, but by reduction. *Bankruptcy howproponable?*
 Stair, 19. June 1663, Reid. The same; 22. July 1664, Laurie.—

Tho' deeds done in defraud of creditors against the act 1621, regularly, need reduction; yet, in a personal right, the matter depending before the Lords, and the parties being poor, such a deed was found simply null. Stair, 5. Jan. 1669, Syms.—A disposition, to a conjunct and confident person, against the act of parliament 1621, was found null by exception, it being no heritable right requiring the production of authors rights. Stair, 16. June 1671, Bowers.—It being alledged in a suspension, at the instance of some creditors of a party *operatus*, against another creditor, That he had taken saline upon his heritable bond, after the debtor was become bankrupt; and the Lords having refused to take in this alledgeance by way of suspension or exception, and thereupon an executed declarator of bankruptcy being produced; and it being contended, that it should be reserved to come in *via ordinaria* by the course of the roll; yet the Lords received in the declarator *hoc ordine*. Fount. 10. Jan. 1708, Creditors of John Davie compering.

IN a spulzie of teinds, the defender excepting upon current tack from an abbot, and it being replied, That the tack is null, *Objections against rights granted by ecclesiastics.*
 as set in diminution of the rental, against the act 1581; the Lords found, That this ought to abide reduction, and was not competent by way of exception. Dur. 13. July 1636, Bishop of Edinburgh.

IN a removing, this exception was found relevant,
 VOL. I. C c That

*In possessory
actions; replies
against the de-
fender's right
reserved till re-
duction.*

That the party was infest upon a comprising; and the Lords refused to oblige the defender to produce the comprising, to dispute its sufficiency *hoc loco*, tho' it was alledged to be led for an heritable sum, not made moveable by requisition or otherwise. Dur. 11.

Dec. 1623, Cunningham.

A PARTY, producing an instrument of requisition, and the other party offering to prove directly the contrary of what was therein inserted, and that by another instrument under the same notary's hand; the Lords refused to admit the same, and only reserved action of improbation. Colv.

*Exceptions
against legal in-
struments.* Feb. 1583, Crawford.

FOUND, that no alledgeance, plainly contrary to the execution of a messenger at arms, can be admitted, unless the party offer to improve the execution. Colv. Feb.

1581, Kilsyth.—A poinder, suing one who had meddled with some of the poinded goods; and the defender, at advising the cause, having offered to improve the poinding *in data*; the Lords repelled the defence *hoc statu*, reserving action, in respect the poinding was produced *ab initio*, notwithstanding it was alledged, That the defence was *novitur veniens ad notitiam*. Dirk.

4. June 1667, Zinian.

AND apparent heir, proponing improbation against a bond, for payment of which he was sued; it was found, That it could not be *bonum proponibile*; received *hoc loco*, the writ being registered, but action of improbation was reserved. Dur. 24. Nov. 1632, Annan. Dur. 16, Feb.

1633, Ker. Dur. ult. March 1637, Veitch.—The Lords refused to hear a party propone improbation of a decree arbitral by way of suspension, tho' he offered to improve the same by the oaths of the judges, who were both present. Hope, (*Arbitration*) 21. Dec. 1614.

Montenith.—John Home, being charged upon a bond of L. 37 Scots, suspended, and offered to improve the bond, as not subscribed by him, but by another John Home. It was answered, Improbation is receivable only

only in a reduction, or where the original writ is produced; but *ita est*, this bond is registred in an inferior court, and the charger is not obliged to produce, nor is the clerk of the inferior court called. The Lords, in respect the matter was of small importance, admitted the reason of improbation, on the suspender's consigning principal sum and annual rent, and declared they would modify a great penalty in case he succumbed; and ordained letters to be directed against the clerk of the inferior court, to produce the principal. Stair, 16 Nov. 1665, Dickson.

METUS may be proponed, not only by way of exception, but reply, and that against a third party, possessor of the thing extorted, but *qui metum non intulit*, seeing it is *actio in rem scripta*. Colv. June 1591, Forb. Sinc. Dec. 1543. Tenants of Cockburnspath, Mait. 17. March 1554, Oliphant.

AN exception against a woman's bond, that it was granted in her widowhood, but after proclamation of her banns, with a second husband, was found relevant, and received summarily, without necessity of reduction. Dur. 29. Jan. 1633, Scot. *Exception against a bond granted by a woman vestita viro.*

FOUND, that a back-rack set, with a clause irritant of two years, running in the third, could not be taken away by exception, but behoved to abide a declarator. Spot. *Irritancy, how proponable?* (Tack) 29. Jan. 1629, Stevenson.—

But thereafter, in the like case, the Lords repelled the defence, and found the suit of removing equivalent to a declarator; but this was because the defender never offered to purge the bygone failure, by payment of all that was due. Spot. (Tack) 29. June 1631, Boswell.

—An heir of tailzie having contracted debt, and thereby incurred the irritancies of the tailzie, the next heir insisted in a declarator, that he had thereby lost his right of property, and that all the bonds, contracted by him and apprised upon, were null, *quoad these lands*. The creditors alledged, that there was no process, to annul their bonds and apprisings, *hoc ordine*, by way of declarator, but that the pursuer must, *via ordinarius*,

reduce, in which case, the creditors will have terms granted them to produce the writs called for. The summons was sustained, in respect there was no bond craved to be produced, or simply reduced, but only, that any bonds granted to the defenders, since the tailzie, are null *quoad* the tailzied lands. Stair, 21. Jan. 1662, Balvaird. One disponed a tenement to his daughter and son-in-law, taking them bound to pay him a certain sum, wherein if they failed, the said disposition to expire *ipso facto*; the disposer was apprised from the disponees, and the apprifer suing the disposer for maills and duties, he alledged, That he ought to have the sum that he had stipulated to himself in the disposition. It was answered, That the apprifer was not bound to pay that sum, all the disposer being to do was to proceed upon the clause irritant by way of declarator, and, in the mean time, the apprifer must have the maills and duties. The Lords finding the cause so favorable, a person disponing to his own daughter and son-in-law, and the disposer yet in possession, did, without multiplying processes, sustain the declarator by exception. Stair, 7. Nov. 1666, Canham.—A tenant, being sued to remove upon a warning, excepted on a standing tack. The pursuer replied, That more than three terms of the tack-duty were resting, so that the defender must either remove, or find caution to pay the bygones. This was not found competent by way of reply, since the tack was still a subsisting right; but the Lords declared, That if the pursuer would add that member to his libel, they would sustain it, without putting him to a new process. Stair, 16. Dec. 1671, Blair.

A MINOR was allowed to propone, by way of exception, That he, having curators, had entered to his predecessor without their consent, altho' he qualified no lesion thereby sustained. Dur. Auch. (Air) Spot. (Heir) 16. Feb. 1627, Simpson.

The contrary formerly found; Dur. 7. Dec. 1625, Clark.—A bond, granted by a minor, without his curators consent, was found challengeable by way of suspension. Auch. (Minor) 9. July 1628, Stormount.—The Lords found minority and lesion proponed by one, who, at granting the writ in controversy,

was in *familia paterna*, receiveable in a suspension, without necessity of a reduction. Dur. 29. June 1637, Lamond.—A cautioner being charged upon a liquid bond, it was found competent by exception, that his subscribing, as cautioner, was null, being without his curators consent. Stair, 22. Dec. 1665, Lesly. Had. 24. Jan. 1611, Moncrief.

A CHARTER having been granted to a vassal, during the superior's minority, and this deed revoked in due time; yet, the vassal, suing afterwards for a sasine upon his charter, the Lords found the defence of minority and revocation not relevant *hoc loco*, and that the charter ought to stand till it be reduced. Mait. 5. Feb. 1566, Currie.—A minor, suing for the malls of a tenement, and it being excepted, That the said tenement was redeemed, and a renunciation granted by his tutor, the minor's reply was, That no declarator of redemption was obtained, and that himself was leased (because the price was not employed to his utility) found not receiveable *hoc loco*, but that it behoved to be libelled. Had. 6. Feb. 1606, Cockburn.—The Lords received minority and lesion, by way of exception, the sum in question being only L. 80 Scots. Auch. (*Minor*) 27. Jan. 1632, Taylor.—Minority and lesion is not competent by way of suspension or exception, but by way of action and reduction. Stair, 28. June 1665, Keil.

Minority and lesion.

IN a suit against an heir, for payment of an holograph bond, death-bed was found not competent by way of exception, but by reduction. Stair, 11. Jan. 1666, Seaton.—The contrary found, and the objection sustained, by way of exception. Gosf. 14. Nov. 1668, Calderwood.

Death-bed.

INHIBITION cannot be used by exception or reply, but only by way of reduction. Stair, 23. July 1674, Johnston.

Challenge upon the head of inhibition.

THE Lords refused to receive interdiction, by way of exception or reply, but allowed the proposer to reduce. Dur. Spots and Auch. (*Executors*) 17. March 1630, Semple. Stair, 20. June 1671, Crawford.—Interdiction proposed in a suspension.

Challenge on the head of interdiction.

suspension, was refused to be sustained, altho' the said interdiction was known to the charger, in respect of the bond standing unreduced; but the Lords suspended execution of the charge to a certain day, assigned to the suspender to do diligence, to obtain his reduction discussed. Dur. 22. Jan. 1631, Hardy.—But interdiction may be proponed by way of reply, which delays not the pursuer. Stair, 13. Feb. 1662, Lockhart.

FOUND, That exhausting may be proponed for an executor by way of exception, altho'

Exhaustion, he have no decree of exoneration. *how proponable?* Colv. Brughton.—An executor, alledging exhausted, and the reply being made, That he had intromitted with as much as would pay the pursuer, not given up in the testament, which the pursuer referred to his oath; the Lords sustained the reply, it being referred to his oath, and found no necessity to put the pursuer to take a dative *ad omnia*, but sustained the trial thereof, in this same process, to be proven. Dur. 24. Jan. 1639, Inglis.

IN a reduction of a bond, at the instance of the grantor's heir, against the creditor, this reason for reducing was repelled, viz.

Turpis causa. That the name of the creditor was only borrowed for the behoof of a *pellex* of the deceased's, he having been married at the time, and that so the bond was granted, *ob turpem causam*: for the Lords found, That this reduction, tending to the trial of adultery, was prejudicial, and, in effect, a precognition to a criminal pursuit, which might be moved against the woman; and that if it were moved before the justice-court, this present action might be a probation there, whereby her life might be in hazard; and therefore repelled the reason of the alledged turpitude, till the same should be tried before some ordinary and competent judge. Dur. 18. Feb. 1624, Fern.

IN an improbation of the grounds and warrants of an inhibition, *in re antiqua*, the party

Proof of tenor, throwing in a summons of proving the *if competent by* tenor, because he had only produced *way of defence?* extracts, which did not satisfy the production; and therefore certification being craved, in regard that certification in an improbation.

bation was not to be stoppt on such pretences; the Lords thought it hard to hinder the defender to prove the tenor *hoc loco*, tho' he had been long in raising it, and, on the other hand, that it was unreasonable to delay the pursuer of the improbation: therefore they declared, They would receive the tenor, *incidenter*, in this same process, and hear them summarily upon the relevancy of the admicules, without further delay. Fount 12-June 1701, Mein.

IT being objected against proving the tenor of a writ, That it was innovated and extinguished; the Lords repelled the objection, *hoc loco*, reserving to the defender to be heard thereon in any action to be raised upon the decree of tenor, in case it should be obtained. Forb. 7-July 1713, Creditors of Orbistoun. The like; Fount. 26. June 1712, Inglis.

What exceptions competent against a proving of the tenor?

AN obligation was transferred *passive*, against both heirs of line and tailzie, reserving the benefit of discussion, and other questions, *contra executionem*. Had. 19. Feb. 1611, In transferring of a bond against a person as heir to his father, it being alledged, That the pursuer had comprised certain lands and teinds for the same debt, and was in possession of some of the teinds comprised; the alledgeance against the transferring was sustained; altho' it was answered, that it was only competent against the execution, but not in a transferring. Spot. (Transference.) 16. July 1633, Lawson.—In a suit against a pupil, charged to enter heir, to pay a debt of his father's, appeared another creditor of the deceased's, alledging, That he would not suffer his debtor's estate to be affected to his prejudice, and offered to prove, That the debt sued on was satisfied. This defence was not found competent *hoc statu*, because it might delay the pursuer, and postpone him to other creditors; but the Lords declared, That it should be receiveable against the pursuer, whenever he should sue for affecting any of the deceased's means or estate. Stair, 24. July 1662, Shed.—An exhibition, *ad deliberandum*, sued by an apparent heir, was sustained, notwithstanding the defender.

Exceptions, if propenahle in cursu diligentiz?

defender offered to prove behaviour, seeing this defence was not instantly verified; for the Lords will not allow a course of probation to stop an action of this nature. Stair, 3. Feb. 1673, Riddech.—An objection being made against the service of a man to one of his predecessors, dead fifty years before; the alledgeance, That the predecessor was a bastard, was found not sufficient to stop the service; and that the exception of bastardy, which, by act 94. parl. 1503, is ordained to be received against a service, ought to be understood of the bastardy of the procurer of the brief, and not of the predecessor, especially in cases of antiquity, as here, otherwise it might be a way to stop all services. Dur. 15. Jan. 1629, Corsbie.—In a general declarator of bastardy, it being objected, That the deceased had obtained a legitimation from the king; it was answered, That legitimation, whatever effect it may have, cannot be disputed in the general declarator, but must be reserved to the special; which was found relevant. Stair, 19. Feb. 1669, King's advocate.—A disposition of lands, being granted without procuratory or precept, in a process against the heirs of the granter, for fulfilling the obligation contained in the said disposition, to grant procuratory and precept, the defence, That the deed was granted on death-bed, was found not competent *in hoc statu*, but reserved till reduction. Home, Nov. 1685, Nilbet.

THE Lords preferred a public infestment, tho' posterior to a private one, clothed with possession, because, that which was public proceeded upon a contract of marriage, and inhibition executed thereon, before the private infestment was taken, and possession obtained upon it; and this was sustained by way of exception in a pointing of the ground, at the instance of the private infester, without any necessity found for the inhibitor to reduce. Dur. 3. March 1626, Law.—In an action for mails and duties, two comprisers competing, who were both infest, but neither of whom had attained possession, the Lords sustained a nality proposed by the one against the other's comprising, by way of exception. Dur.

26. July 1628, Mitchelson,—In a competition, about the maills and duties, between a singular successor in a wadset right, and the reverser, it was not found competent by way of exception, but by action of declarator, that the wadset was satisfied and extinct by intro-mission, it not being founded upon any article in the contract of wadset, but upon an unwarrantable intro-mission of the pursuer's author. Stair, 29. Nov. 1671, Justice.—In a competition between two creditors on an estate, the one founding on a base investment of ward-lands, and the other repeting a declarator of recognition he had against him on that head; the Lords received the declarator, even *hoc ordine*. Fount. 17. March 1685, Forbes.

A FATHER has right to the *beneficium competentiae*. Falc. vol. I. p. Later decisions. 80. Bontein. 21. Feb. 1745.

THE benefit of competency was found due to a grandfather. Falc. vol. II. p. 118. Hogs, 30. Dec. 1749.

A PETITION, after extract, refused as incompetent. Fac Col. vol. III. p. 142, Haldane, &c. 4. Aug. 1761.

WHAT *allegedances proponable against a process of adjudication*? See *Adjudication*.

OBJECTIONS *competent to one party and not to another*. See *Jus tertii*.

COMPETITION.

ARRESTMENT does not bar other creditors to carry off the goods by pointing. Had. 5. June 1611, Wright. *Arresters with poinders.*

Dur. 11. March 1635, Dick. Dur. 12. Feb. 1636, Leslie. Stair, 4. Dec. 1679, Forrester.

Dur. 29. July 1634, Hunter. And even an inchoat pointing, which was stopped without any fault of the creditor, was found to give a preference in competition with an arrestment, first completed by a decree of forthcoming. 13. Feb. 1736, Muirhead.

ARRESTMENT, upon a dependence, with sentence following, found preferable to an assignation intimate after the arrestment, tho' before sentence. Hope, (*Arrestment*) 16. June 1618.—But an assignation, *Arresters with assignees.*

nation,

nation, tho' intimated after the arrestment, was preferred, the arrestment being upon a dependence, and no decree as yet recovered against the common debtor. Dur. 6. Dec. 1638, Douglas.—An assignation, intimated before arrestment, is preferable. Dur. 23. June 1642, Nisbet.—An arrestment, and the intimation of an assignation, being made in one day, the Lords brought them in *pari passu*, and divided the sum between them. Spot. (Creditor) 28. Jan. 1650, Inglis.—In a competition between an assignee and an arrester, the Lords preferred the arrester, whose execution bore to be two hours before what the intimation bore. Dur. 30. Jan. 1629, Davidson.—An arrestment, and the intimation of an assignation, being on the same day, only the intimation mentioning the hour, and the common debtor having declared under his hand, That the arrestment was two hours prior to it; the Lords ordained them to come in *pari passu*. Home, July 1687, Addie.

ARRESTMENT having been laid in a tenant's hands, in a process of forthcoming, raised against him after he was removed from the lands, an annualrenter appeared, insisting in a personal action. who had a poinding of the ground, and insisted to be preferred; the Lords found, That the annualrenter, having done prior diligence, whereby he might have poinded the tenant before he removed, albeit he did prejudge himself of all execution against the tenant's goods after they were off the ground; yet *quoad* the duties payable to the master, for which he might sue him *personali actione*, he was not prejudged thereof by the tenant's removal: but the decree of poinding the ground, and letters thereof, being a real execution, prior to the arrestment, made him preferable to the arrester. Gosf. 1. Feb. 1670, Wilson.

AN arrester of the maills and duties, was preferred to another creditor, who had a disposition of the lands for security of his debt, but without *saſine*, without possession, unless by holding of courts, and without being assigned to the maills and duties. Dur. 24. June 1642, Forrester.—An arrester was preferred to a wadsetter, because his *saſine*, which was the only ground of

of complete real right to the lands, was after the arrestment. Dur. 22. Nov. 1633, Warnock.

AN arrestment of farms cannot be of force, being made before Martinmas, if, *medio tempore*, the lands be comprised, and the *Arresters with apprisers*. Hope (Arrestment) 2. Dec. 1628, Cumming.

Dur. 13. Dec. 1628, Huntly. Arrestment laid on *currente termino*, affects the next ensuing term's rent, and was preferred to an apprising, deduced also before the term, tho' after the arrestment, and whereupon infestment followed after the term. Stair, 2. July 1667, Lister.—A decree of apprising as to maills and duties, is a complete diligence, being a legal assignation needing no intimation, after which there is no place for *marā*. Upon this footing, an appriser of an infestment of annual-rent, was preferred to a posterior arrester of the bygone annualrents, tho' the competition was nine years after decree, and the former had done no diligence all that time. Stair, 23. Feb. 1671, Lord Justice-Clerk. It was formerly otherwise decided; Dur. 14. Feb. 1623, Salcotes.—A compriser, infest, was preferred to a subsequent arrester, altho' he had suffered the debtor to retain possession of the lands for many years after his comprising and infestment, which was urged as a presumption of simulation or dereliction of his diligence. Dur. 13. Dec. 1627. Tenants of Dryop.—In a competition between an adjudger and arrester, the subject being an heritable bond, the citation on the adjudication being prior to the arrestment, and the decree of adjudication also prior to that of forthcoming, the Lords preferred the adjudger. Dalr. Forb. 26. June 1705, Stewart.—In a competition between two creditors of a deceased, about the rents of the estate falling due after the debtor's death, both having obtained decrees of constitution against the apparent heir; the one upon an arrestment, laid on in the tenants hands, as debtors to the apparent heir, obtained forthcoming; the other, upon a charge to enter heir, obtained adjudication some months thereafter; the Lords preferred the arrester, tho' it was urged, That an apparent heir has no proper title to the rents, and that they cannot be made forthcoming for his debt. 8. Jan. 1724, Syme.

AN arrester suing forthcoming, after the common debtor's decease, was preferred to an
Arresters with executor-creditor of the deceased, who
executor cre- had confirmed the debt arrested, as
ditors. *in bonis defuncti*, and had even gone

so far as to obtain decree against the debtor, in whose hands the arrestment was laid. Stair, 20. Jan. 1681, Riddel. The like found; Harc. (*Arrestment*) Feb. 1688, ——— An arrestment, laid on before the common debtor's death, with a decree of forthcoming, obtained after his death, was preferred to an executor-creditor, who was indeed confirmed before the decree of forthcoming, but had not eiked the subject in controversy, till after. Harc. (*Arrestment*) 29. June 1688, Russel.—In a competition between an arrester on a dependence, and another creditor, who, after the common debtor's death, confirmed the arrested subject, as executor-creditor; the Lords preferred the executor-creditor *hoc statu*, he finding caution to make the sums forthcoming to the arrester, in case the arrester's claim should be purified. 20. July 1731, Crawford.

AN assignee, neglecting to intimate, during the cedent's life, an executor-creditor of the deceased's confirming the subject, as
Assignees with deceased's confirming the subject, as
executors cre- still in *bonis defuncti*; it was found to
ditors. be a valid confirmation, and preferable to the posterior intimation of the assignee. Home, 5. July 1726, Sinclair. The contrary found; Stair, Gosf. 27. July 1669, Executors of Redpath.

A GENERAL assignation of moveables, with a power to intromit, and enter to possession, immediately upon the granter's decease, tho' possession be apprehended accordingly, is not sustained in our law as a transmission of the property; but these goods must be confirmed: for, without confirmation, the disposition, tho' clothed with possession, will found no better right than a *jus crediti* for the value. The reason is, that the power to apprehend possession is a procuratory, *quod perit morte mandantis*, as procuratories did, with regard to land-rights, before the act

act of parliament; and if confirmation be necessary, the assignee can stand on no better footing than any other creditor. Thus an assignation, in a contract of marriage, to the wife, of the whole household-plenishing that should belong to the husband at the time of his decease, was found only to make the wife creditor, for the value upon the implied warrandice, so as to bring her in, *pari passu*, with other creditors, confirming within six months; but she was found to have no preference, tho' she got into the natural possession, after her husband's decease, and also confirmed the subject prior to any step of diligence by the creditors. July 1732, Children of Kimmerghame. The like; Forb. MSS. 26. Nov. 1713, Borthwick.—And, in a general assignation, to the wife, of heritable and moveable subjects, intimate, after the husband's decease, to a debtor, from whom she uplifted several years annualrents of an heritable bond; the Lords preferred an adjudication, deduced after intimation, in respect the general assignation was not confirmed. July 1724, Stirling.—Yet a disposition, by a husband to his wife, of his moveables, upon the Mains of Auchinvill, was found sufficient to defend the relict in her possession of these moveables, against an executor-creditor, suing for the same. Stair, 3. July 1663, Gordon.

ASSIGNATION intimate, was preferred to a posterior comprising, altho' the denunciati-
on was made before the assignation was
intimated, because a denunciation does
not affect the sum, nor make it so real,
but that the assignee may effectually perfect his intima-
tion thereafter. Dur. 2. March 1637, Smith.

*Assignees with
comprisers.*

ASSIGNATION out of the first and readiest of the
teinds of several lands, in security and
payment of a debt, was not found good
against a posterior apprising of the
lands and teinds, Stair, 6. Feb. 1666,
Watson.—A compriser of lands and
teinds, in a competition of maills and
duties, was preferred to an anterior assignee, who had
not apprehended possession before the sale upon the
comprising, but had only intimated his assignation after
the comprising, and before the sale. Had. 17. Dec.

*Assignation to
maills and du-
ties, with other
rights.*

1622, Hamilton.—The cedent continuing still proprietor of the lands, notwithstanding of an assignation to the maills and duties, must have a power of alienation; and of consequence, the purchaser, who has right to the lands, must of necessary consequence have right to the produce of the lands; therefore it is, that the assignee's right to maills and duties, which is only a personal claim against possessors, and no real right in the lands, must fall so soon as the cedent is denuded by infestment. Dur. 13. Dec. 1628, Huntly.—A factory to a creditor, to uplift rents till he should be paid, not good against a singular successor in the lands. Spotif. (*Factor*) 17. July 1632, Borthwick.—A tack being set by an heritor, and therein the tack-duty appointed yearly to be paid, not to himself, but to one of his creditors, by virtue whereof, the said creditor was in possession; the Lords preferred this creditor to a posterior compriser not infest. Dur. 13. Feb. 1627, Samuel.—A tack, being set with this express clause, That the duty should be yearly paid to such and such creditors of the setter *nominatim*; and another creditor having thereafter comprised the lands; the Lords preferred the compriser to the creditors, seeing, the setter being denuded by infestment upon the comprising, the duty behoved to belong to the compriser, in consequence of his real right. Spot. (*Comprising*) 27. Dur. 28. Nov. 1635, Morison.—A proprietor of an entailed estate, having granted to a creditor, an assignation of maills and duties, the assignation, after the granter's decease, was found effectual against the heir: for tho' he did not represent the deceased, with respect to the debt in question, contracted contrary to the entail, yet, the entail not being recorded, the debt might be made effectual against the estate by adjudication; and therefore, the heir could have no just interest to quarrel the form of the conveyance. Nov. 1732, Baillie.—The Lords found an adjudication, *contra hereditatem jacentem*, preferable to an assignation of maills and duties, granted by the deceased proprietor, where the competition was about the rents that fell due between the proprietor's death, and the date of the adjudication. 12. Jan. 1734, Earls of London and Glasgow.—A tacksmen of teinds, having assigned the teind-heaves, payable, by the heritors, in security and payment

ment of a debt; this was only found a personal right, tho' clad with possession, and was not sustained to compete with a posterior assignee; to the tack itself, a tack being a real right. Dur. 27. March 1628, Blantyre.—A woman having granted bond for a sum, payable the first term of Whitsunday or Martinmas after her death, at the same time, assigning to the creditor, for his security, as much of the readiest of the rents due by her tenants at her decease, as should pay the same; and having thereafter married; in a competition after her death, between the husband and the creditor, the husband contended, these rents belonged to him *jure mariti*, as the first completed right, requiring no intimation. Answered, Tho' the husband's right be, in its nature, preferable, yet, as he is liable for his wife's debts, after dissolution of the marriage, *quatenus locupletior*, there lies a personal objection against him from competing, unless he will pay the debt. The Lords preferred the creditor. Gilm. 25. Jan. 1662, Cunningham.

AN heritable bond, before denunciation, in a comprising, tho' the infeftment was posterior thereto, was preferred, being before *Apprising* infeftment on the comprising. Hope, *with voluntary (Apprising)* 16. June 1612, Hender- *rights.* son.—The like, of an infeftment upon resignation, which resignation preceded the denunciation; Hope, *(Apprising)* 22. March 1622, Hope.—The like; Dur. 11. July 1637, Robertson.—In a competition between an apprising and a voluntary disposition, the Lords, in respect that the disposition was prior to the denunciation of the apprising, preferred the voluntary right, completed by confirmation of the superior, altho' posterior to the charge upon the comprising; in regard the charge was only to be considered in the competition of diligences among themselves, but not with voluntary rights. Home, Dec. 1682, Falc. 10. March 1683, Aikenhead. July 1728, Mair.—The like; Home, 26. Feb. 1724, Stirling, in the case of an infeftment of annualrent.—A disposition of the same date with the denunciation, having the first infeftment, was preferred to the apprising. Spotis. *(Comprising)* 31. Jan. 1628, Hamilton.—An infeftment of annualrent, being after the first apprising, but before the second, all three were brought

in *pari passu*, being within year and day, the statute being new and dubious. Stair, 6. Feb 1673, Brown.

AN executor-creditor, for a *liferent* annuity, being sued, within six months of the common debtor's decease, by another creditor, for payment of a debt due to him; the

Liferents with other debts.

Lords found, That the inventory of the testament ought to be divided proportionably between them as follows, *viz.* The *liferenter* to be reckoned as a creditor in a principal sum, answerable to her *liferent*-annuity, and the other creditor in the debt resting to him at the time of the confirmation, and the inventory to be divided between them in that proportion. Next they found, That the share of the inventory, thus falling to the *liferentrix*, must be considered as a stock, of which she is to have the use during her life, but that she must find caution to make the same forthcoming at her decease, to be divided between her representatives and the other creditors, in proportion to what is yet resting of their respective debts, her claim being the *inlacks* of the jointure, after giving allowance of the annualrent of her share of the inventory, and the other creditor's claim being what remains due to him, after giving allowance of his share of the inventory, with annualrent of the balance. Dal. 3. Forb. MSS., 4. Dec. 1713, Eskine.

IN a competition between charters of resignation and confirmation, past in exchequer, and seal'd the same day, the charter of confirmation is preferable to the charter of resignation, the former being complete by sealing, and the later incomplete till *fasine* thereon. Harc. (*Infestment*)

Charters of resignation and confirmation.

Infestment upon resignation, with other rights.

THE Lord Renton, suing for the casualties of the office of Forrestry belonging to the abbacy of Coldingham, against the fevers of the said abbacy, the defenders produced their old charters, burdened with no such casualties; the pursuer produced a charter of resignation with *fasine*, containing the forrestry, flowing from the abbot of Coldingham, prior to any of the defenders' *infestments*; but then it was answered for the fevers, That

That a charter of resignation confers no more right than the resigner had, and therefore, unless the original infeftment be produced, the charter upon resignation can signify nothing. The Lords sustained the pursuer's title, being *in re antiqua*. Stair, 17. Jan. 1666, Renton.

THE common author, whose right to his lands was a disposition with procuratory and precept without infeftment, granted first infeftment of annualrent, and thereafter disponed the lands irredeemably to another, and conveyed his procuratory, upon which the purchaser was duly infeft. In a competition, the annualrenter pled, That the common author was *funditus*, denuded of his personal right to the lands, by granting the heritable bond, which implied a conveyance of his disposition, to the extent of the sum in the heritable bond, after which the second disposition was *a non habente potestatem*. The Lords found, That an assignation to an incomplete real right, tho' it had been directly done and intimated, has no effect against another singular successor completing his right by infeftment. Stair, 20. June 1676, Brown. — A naked disposition of lands was found to denude the granter *funditus*, who had no more himself than a disposition, with procuratory and precept, so that nothing remained with him thereafter to be carried by a legal or voluntary conveyance. Upon this footing, the disponent was preferred to a posterior appriser, whose apprising was led against the common author, tho' the appriser had gone on to complete his right, by obtaining infeftment on the procuratory contained in his debtor's disposition. Forb. 8. Dec. 1710, Rule. — The like ; 20. Nov. 1733, Sinclair. — Upon the same footing, the first disponent was preferred to the second disponent first infeft. Forb. 19. Dec. 1710, Erskine. — But thereafter, in a similar case, the Lords laying aside all specialties, took up the question in the abstract, and having first pronounced an interlocutor in favor of the personal right, being the first conveyance, led by the weight of former decisions, they, upon petition and answers, a hearing in presence, and informations, preferred the second conveyance, being an adjudication, in respect

Between singular successors, where the common author is not infeft.

that infestment was expedite on the same, the other remaining still personal, and they refused a reclaiming petition without answers. 22. June 1737, Bell.

IN a competition of rights flowing from different authors, the eldest was preferred, tho' *Between in petitorio*, the other being in a possession. Stair, 7. Feb. 1667, Smeton. — In a competition between two base infestments, flowing from different authors, the Lords preferred that right which was in possession, tho' the right, on which the process was founded, was of an older date, and refused to sustain the reduction, without a progress from the king, or a common author, or prescription; for the defender argued, that he being in possession, and producing any infestment as a title, it cannot be taken away but by a prior complete right. Stair, 16. June 1674, Brown.

THERE being a set of adjudications affecting a subject, and the adjudgers being ranked *Annualrent-ers, adjudgers, inhibitors, &c.* *pari passu*, some of whom were struck at by inhibition; in respect that the other adjudications were more than sufficient to exhaust the subject, it was found, That the inhibition could have no effect, and that the inhibitor, who had not adjudged, could not come in *pari passu* with the rest, even tho' he should now adjudge, it being more than year and day since the first effectual adjudication, and that therefore, he could have no interest to reduce, seeing he could make no benefit by his reduction. 15. Feb. 1698, Miln. — There being three sorts of creditors on a bankrupt estate, some who had inhibited and adjudged, others who had only adjudged, but for debts prior to the inhibitions; a third sort, who had got voluntary rights and infestments of annualrent, but posterior to the inhibitions; the inhibitors having obtained decree of reduction against these annualrenters, and they being thus out of the field; and the inhibitors contending, that they must come in place of the annualrenters, and draw the share that belonged to them, and for what remained of the estate, the annualrenters must affect the same, before the adjudgers could get any thing, and so, *si vinco te vincam, &c.* the vote was stated, Whether a creditor-inhibitor was only

only to be preferred so far, alienarily, as he would have been, in case no posterior annualrenters had intervened, or if he, upon reducing the infestment of annualrent, must be ranked in his place, and draw accordingly, until his inhibiting debt was satisfied and paid? It carried, That he should only draw a share, so far as the annualrenter prejudged him, and as if the annualrent had never existed, but not to have the annualrenter's full sum. Fount. Dal. Forb. 20. Jan. 1709, Creditors of Langtown competing.—In a ranking, there was first a prior and preferable annualrenter, 2dly, A set of adjudgers, coming in *pari passu*, of which one had an inhibition that struck at the annualrent-right: the annualrenter was ranked *prime loco*, and the inhibiting adjudger was allowed to draw out of the annualrenter's share, to make up what she would have drawn, had the annualrenter not been in the field; but then the dispute arose, Can the annualrenter recur against the other adjudgers, for any share of what is drawn from him by the inhibition? The adjudgers argued, That he could not, because the inhibition is directed against the annualrenter only, making a personal challenge against his right, which the adjudgers are not concerned with; that it could make no variation upon their case, whether there be an inhibition or not, and that to allow the annualrenter to recur, is, in plain English, making the inhibition strike ultimately against them, whereas, *ex concessis*, it strikes only against the annualrenter. The Lords found, That the annualrenter, being ranked, so as to draw his share, in competition with the other creditors, he could not recur against the adjudgers, for any part of what was drawn from him by the inhibition. Feb. 1730, Campbell.

AN arrester, between twelve and one in the morning, was preferred to one between five and six. Falc. vol. I. p. 85. Jones, *Later decisions*. 26. Feb. 1745.

A SECOND assignee to a personal right, first completed by infestment, carries the profits accruing thereon, between the date of his assignment and the infestment. Falc. vol. I. p. 305. Kinminnity, 9. Dec. 1747.

THE deficiency, occasioned by an inhibition, falls wholly on the postponed annualrenters. Falc. vol. I. p. 206. Lithgow, 23. Jan. 1747.

CREDI-

CREDITORS, obtaining decrees against a person, liable to a certain extent, have no preference from the date of their decrees. *Falc.* vol. I. p. 154. Grant, 3. July 1746.

A DECREE of sale, at the instance of an apparent heir, within year and day of the first effectual adjudication, brings in the whole creditors, whether adjudgers or not, *pari passu*. *Falc.* vol. I. p. 319. Irvine, 29. Jan. 1748.

A CURATOR, having accepted a bill, bearing to be for the amount of an account furnished to his minor, and the creditor having assigned it, and the assignee competing with a prior arrester in the hand of the minor, the arrester was preferred. *Falc.* vol. II. p. 8. Gibson, 10. Nov. 1748.

AN Infestment of annuity, was found a title to receive payment from the tenants without a decree of poinding, and therefore was preferred to an arrestment of the rents. *Falc.* vol. II. p. 1. Creditors of Kilhead, 2. Nov. 1748.

THOMAS CRANSTON, being debtor to Horseburgh of that ilk, by bond, was inhibited by him; after which he granted, first an heritable bond to Henry Davidson, who was infest thereon; and then an heritable bond of corroboration, accumulating the interest due to Horseburgh, who was also infest, and who adjudged upon it, without mentioning, in the decree, his original bond. Other creditors adjudged, who fell without the price: Horseburgh, the inhibitor, was preferred on his first bond; after him Davidson, the annual-renter; and then the inhibitor, for the accumulations in his bond of corroboration. *Falc.* vol. II. p. 163, Horseburgh, 16. June. 1750.

INHIBITION affects the debts contracted, after executing of it; and, in a question, Whether the deficiency, occasioned by the draught of the inhibitors, ought to be proportionally borne by all the debts struck at, or by the creditor ranked in the last place; the Lords found, That the deficiencies ought to be laid first on the debt ranked in the last place; and so in order on the next, till the inhibitor was paid. *Falc.* vol. II. p. 143. Smeall, 2. Feb. 1750.

NOTWITHSTANDING an adjudication was within year

year and day of the first effectual one, and that a process of mails and duties, in the 1696, was raised upon it; yet, as the last adjudger took no other step till the 1706, the date of the infestment, in favor of the first adjudger, nor till several years thereafter, it was found that he could not compete with the first adjudger, nor interpel the proprietor from granting a voluntary infestment on his estate. *Falc. vol. II. p. 120. Binning, 5. Dec. 1749.*

A DEFICIENCY, occasioned by an aliment granted, by consent, to a common debtor, was found to affect the postponed creditors. *Falc. vol. II. p. 144. Creditors of Hope, 2. Feb. 1750.*

A CREDITOR, having two persons bound to him, one of whom he knew to be a cautioner, taking his payment out of the principal debtor's effects, to the prejudice of other creditors, was found not bound to assign against the cautioner. *Falc. vol. II. p. 117. Miller, 24. Nov. 1749.*

A FATHER disposed part of his estate to his second son, with absolute warrandice, on which he had formerly given security for a debt; and dying, was succeeded by his eldest son, in the remainder of his estate. The creditors, to whom the said security was granted, led an adjudication, comprehending the estate of both the brothers, and other creditors adjudged only the estate of the eldest son; The Lords found, That if the father's creditor took his payment out of the second son's estate, he behoved to assign. *Falc. vol. II. p. 249. Creditors of Fullerton, 12. June 1751.*

AN infestment, taken for security of certain debts, which were annuities by bond, referring to a list, which contained the names of the creditors, and their annuities, but the endurance of each annuity was only qualified by the bonds; was found not to subsist, so as to secure these debts, in competition with a posterior adjudication, where, after the date of the infestment, the original bonds were delivered up and cancelled, and in their place, new bonds taken for the same sum. *Fac. Col. vol. I. p. 31. Norfolk, &c. 30. June 1752.*

NO equity will relieve against want of infestment. *Fac. Col. vol. II. p. 62. Wilson, 6. July 1757.*

A CLAIM of reversion being adjudged, and certain
other

other creditors having arrested, the adjudication was found the only proper diligence to carry the reverfer's interest. Fac. Col. vol. II. p. 229. Jackson, &c. 18. July 1758.

IN a competition between an heir and executor, a sum, secured by adjudication, was rendered moveable by a decree-arbitral, and a charge of horning, given by a factor. Fac. Col. vol. III. p. 82. M'Kenzie, 19. June 1761.

IN a competition between an assignation and an arrestment, the assignee was preferred. As observed by the collectors of this decision, The Lords seemed to determine the case upon the want of title in the arrestment. Fac. Col. vol. III. p. 112. Sharp, 28. July 1761.

AN assignation, granted by a woman before, tho' not intimated till after her marriage, is preferable to the legal assignation, by the marriage. Fac. Col. vol. III. p. 276. Rae, &c. 27. July 1763.

IN a competition between real and personal creditors, the real creditors were preferred. Fac. Col. vol. III. p. 32. Creditors of Gillespie, 24. July 1764.

A CREDITOR to an heritable bond, was preferred to a prior creditor by adjudication, who was *in mora*. Fac. Col. vol. III. p. 339. Douglas, 29. July 1764.

COMPETITION, *porteurs of bills with other creditors.* See *Bill of Exchange*.

————— *Donatars of escheat with creditors.* See *Escheat*.

————— *Disposition with a posterior gratuitous disposition of the same subject clothed with infestment.* See *Bankrupt*.

————— *Base infestment, with other rights* See *Base infestment*.

————— *Tacks, with other rights.* See *Tacks*.

CONCURSUS ACTIONUM.

THE deed of contravention, being ejection out of the house, the party has his choice, whether to insist in an action of ejection or contravention; for the Lords found, Where a party has two actions upon the same fact, he may chuse either; but if both tend to the same end, whether *ad pnam* or reparation, chusing the one sopites the other. Dur. 19. Feb. 1630, Hiddleston. Fount. 8. Jan. 1712, Heriot.—And, in a like case, where the party had made his choice, and taken a decree of violent profits, upon election, the Lords refused to sustain contravention, and that altho' the pursuer was content to renounce his decree of violent profits. Hope, (Contravention) Had. 13. Dec. 1610, Johnston. Had. 29. Nov. 1611, Hepburn.—A party, having either stolen, or found, some bank-notes belonging to another, the pursuer first took a precognition, by getting a servant examined before a magistrate, and next procured a warrant from the Lord Advocate to secure the party, till he should find caution, which accordingly he did; and thereby the pursuer seemed to have made his election of the criminal process: yet the Lords, when the pursuer came to insist before them, *ad civilem effectum*, repelled these dilators, and sustained the process, *ad civilem effectum*, to make up the pursuer's loss. Forb. 15. Fount. 16. Feb. 1712, Buchanan.—The Lords sustained a contravention, altho' the magistrates of the place (both parties being burghers) had immediately committed the party to prison for the fact; and this, because no satisfaction was decerned by the magistrates to be given to the complainer. Dur. 20. March 1623, Fithie.

A PARTY, intending an action of proving the tenor of a writ, and also another action of exhibition and delivery of the same writ, against a third person; the Lords found, That altho' it was *cum diversis personis*, yet *electione unius, tollitur altera*, Colv. June 1590, Home.—The like; Had. 20. Dec. 1592, Guthrie.

Where different actions arise upon the same fact, tending to the same end, the pursuer cannot insist on both.

The same, where the conclusions are contradictory?

THO'

THO' the party deforced has sued criminally, *ad vindictam publicam*; for punishment, he

But where the conclusions are different, he may insist on both. may thereafter sue civilly for his private interest. Stair. Gosf. 13. Dec. 1672, Murray.—The like; Dur. 25. July 1633, Mitchel.—The Lords found,

That they themselves might take trial of a battery, *ad civilem effectum*, that the party who does the wrong should, *cadere causa*, but that this did not pre-judge a criminal suit for the breach of the piece. Gosf. ult. Jan. 1673, Swinton.—The like; Fount. 15. June 1711, Scot.

AN inferior judge, having both fined a party accused of a riot, for contumacy, in not com-

After a fine for contumacy, the judge cannot fine a second time for the delict. appearing, and likewise cognosced the crime, and fined for that also; the Lords found the procedure illegal, because he ought to have followed one of these methods, and not to have used both. Fount. 14. Feb. 1708, Thomson, &c.

CONDUCTIO INDEBITI.

ACTION of repetition found competent to an assignee against an arrester, whose arrestment was posterior to the intimation of the assignation, but who had obtained payment on a decree of forthcoming. Dur. 13. Jan. 1629, Finlayson.—A debtor, who had paid to the obtainer of a decree of forthcoming, and got his discharge, being thereafter decerned at the instance of an assignee, whose assignation had been intimated before the arrestment, sued the arrester upon the warrantice of his discharge. It was alledged for the defender, He could not be liable, seeing *suum recepit*, and the pursuer had not obtruded, as he ought, the anterior intimation of the assignation during the process of forthcoming, which, if he had done, the arrester would have secured himself upon the other estate of the common debtor, who now is become bankrupt. The Lords sustained the alledgeance, and assilized. Harc. (*Arrestment*) March 1684, Ker.—*Repetitio nulla est ab eo qui suum recepit*, &c.

et ab alio quam vero debitore solutum est, but an executor-creditor, suing upon his confirmation, and obtaining payment from the debtor's heir, was decerned to refund, it being afterwards found, that the debt had been paid to the original creditor. For, in this case, as the heir was not debtor, neither was the other creditor; for tho' he was creditor in the debt upon which his confirmation proceeded, he was not creditor in the debt in question, which was extinguished by payment before his confirmation, and as to which, he could be in no better case than his own debtor, in whose right he came by the confirmation. Stair, Goss. 10. Jan. 1673, Ramsay.

A CREDITOR having assigned the whole sum, after getting payment of a part, and the assignee, getting payment of the whole, it was found relevant against a *condictio indebiti* sued against him, that his assignation was in satisfaction of a debt due to him by the cedent, equivalent to the sum assigned; so that he got no more from the debtor, but what was due to him by the cedent. Stair, 23. Feb. 1681, Mar.—An heir, having ignorantly paid a debt over again to an assignee, which his predecessor had before paid to the cedent, was found to have no repetition off the assignee, the cedent becoming bankrupt after the second payment. Home, 24. July 1723, Argyle.

A SCOTSMAN, who was a soldier, having died in Flanders, and left a sum of money in the hands of his colonel, which a creditor of his uplifted from the colonel, by virtue of an administration in the prerogative court of Canterbury; the Lords found it relevant, to assilzie the creditor from repeting the said money to executors *qua* creditors, and confirmed before the commissaries of Edinburgh, that he got *bona fide* payment before any process or confirmation in Scotland. Forb. 12. July 1713. Creditors of Muirhead.

CONDICTIO indebiti, sustained to one who paid *erroris juris*. 26. July 1733, Stirling.

CONDITION.

THE clause, in a contract of marriage, *si sine liberis*, was found *Condition si sine liberis*.
not to take place where there was a

son born, who survived his mother, but died without being served heir; so that in this case the tocher was found not repetable, which it was to have been, if the mother had died without children. Auch. (Air) Dur. 27. Jan. 1630, Colmessie. Hope, (Husband) 16. June 1630, inter eosd. Gosf. 11. Jan. 1677, Baillie.—But where the child was born, and died before the mother, they found, *quod extetit conditio, et casus restitutionis dotis solut.* Hope, (Husband) 1603, Linlithgow. Harc. (Contracts of Marriage) 12. July 1688, Smeton.—A provision of conquest to a wife, “in case there be no children of the marriage,” was found not evacuated by the existence of a child, who died the same day it was born. Stair, 27. June 1676, Dunfermline.—The like, where the clause was expressed, “In case the wife depart this life without bairns, lawfully procreate of the marriage;” in which case it was found, That the survivancy, and not the existence of children, was understood; and therefore, that the provision must be effectnal, seeing the children procreate died without issue, before their mother. Stair, Fount. 18. June 1680, Oswald.—A wife, being empowered in her contract of marriage, to dispose of 1000 merks of her tocher, “failing heirs procreate of the marriage;” and there being a child of the marriage, who died before dissolution thereof, the wife disposed of the 1000 merks in favor of her brother, who sued for it after her decease. The Lords found, That the procreation and existence of the child, did evacuate the provision, tho’ it died before dissolution of the marriage. Harc. (Contracts of Marriage) Dec. 1687, Ballantine.—There being a provision in a contract, That in case the husband died before his wife, leaving children, one or more, unprovided and unforsifamiliate, then she should restrict her jointure to the half; and one child having survived the father, and died a few months after, the relict was sued to restrict. Alledged for the defender, The clause of the contract was calculated for a subsistence to the children, who now are dead, and so need none. The Lords found the wife ought to restrict herself to the half. Fount. Harc. (Contracts of marriage) 22. Nov. 1687, Robertson.—The Earl of Kincardine, having granted a bond, for implement of his

his contract of marriage, for securing 80,000 Guilders on land, in favor of his Lady, in case of no children of the marriage, or, of their dying before the age of twenty, "so as they might, and did dispose of the same," with a resolute clause, making void the infestment, in case of the childrens attaining to that age, the Lords found, That the provision, irritating the infestment, was to be strictly interpreted, and that it took effect by any of the childrens attaining to the age of twenty, tho' they did not dispose of the sum; and the Lords would not supply the words, *So as they may, and do dispose*, as an omission, altho' they were mentioned in the narrative, and procuratory, and requisition, and the charter. *Harc. (Infestment)* 29. Nov. 1681, Kincardine.—A bond being granted by a man to his lawyer, for a sum payable at the first term after the granter's decease, "providing he died having no heirs-male of his own body;" here it was found, That the heir-male, born of the deceased's daughter, purged not the condition, which was interpreted of sons begotten immediately by the granter himself. *Dur.* 2. March 1624, Curriehill.—A wife, in her contract of marriage, having accepted a certain sum, for all she could crave by her husband's decease, "in case there were no bairns of the marriage;" the restriction was found not to take place, seeing there was one child who survived the mother. *Gilm* 31. Jan. *Stair*, 17. Feb. 1663, Forsyth.—Lands having been tailzied to heirs-male, by a contract of marriage, with a clause therein in favor of the daughters, "That in case there be no heir-male of the marriage, but daughters, in that case, the heir-male, and of tailzie, succeeding thereto, shall be bound to pay to the daughters a certain sum;" and there having been an heir-male of the marriage, who was served and retoured, and lived many years, yet died before the daughters, whereupon the lands devolved upon the king, as *ultimus heres*; in a suit, at the instance of the daughters, against the king's donatary, for the said sum, the Lords found, That the condition of the provision of these daughters did fail, and therefore assilzied. *Fount.* 25. July 1688, Somervell.—A party, in his bond of provision among his children, having subjoined a clause, "That in case his whole chil-

"dren deceased, without heirs of their body, he obliged himself to pay a certain sum to his wife;" and all his children having accordingly deceased, and one of the daughters leaving a male child, who was never served heir, but died a little after his mother; besides, that this child's uncle, one of the testator's sons, having survived him, and thereafter died childless; in a suit, upon this bond granted to the relict, against the deceased's next heir, the Lords decided, That the son's surviving his mother, was sufficient to extinguish the bond, seeing, altho' the child was never served heir, yet it could never be said, that the deceased's children died without heirs; and therefore found, That the relict had no right to the sum, and assolizied the defenders. Fount. 8. Dec. 1702, Watt.—A bond being only to subsist, falling children between the granter and his wife, was found to be void by existence of children of the marriage, who survived the granter, tho' they died before his wife, without issue. Bruce, 16. Feb. 1715, Royston, &c.

A PERSON having given a bond to a woman, for a sum of money, she always marrying with his consent; the Lords decerned him to pay the same, altho' she married without it. Colv. Dec. 1578, Cullairny. Hope, (*Obligation*) 18. July 1617, Kennoway.—In a removing, the exception being upon a tack, and the reply, That the tack had this condition, "That if the defender's daughter married without the pursuer's author's consent, the tack should be null;" the Lords found, That this consent behoved to be express, in order to validate the tack; and that the party's silence, at the marriage, and even his living in good correspondence with them, for twenty-five years thereafter, transacting several bargains with them, &c. was not sufficient to infer his consent. Dur. 16. Dec. 1629, Home.—One having granted bond to his niece, under this condition, "That she should marry with his consent;" the clause was strictly interpreted, he not being *aliunde* bound to provide for her; and it was found, That his subscribing witness to her contract of marriage, or being present at the marriage, did not import such a consent as was required in the

the condition of the bond, unless it had been specially mentioned and treated upon. Stair, 17. Jan. 1673, Rae.—Marriage being free, the Lords refused to sustain conditions and limitations thereanent, adjected to bonds of provision to daughters. Gilm. 8. Jan. 1663, Gordon.—A daughter, being already competently provided, the father gave her an additional provision, but which was to become void, if she married without his consent; notwithstanding of the favor of marriage, the Lords found the irritancy incurred, she having married without her father's consent, tho' it was a suitable match. Stair, 13. Feb. 1680, Buchanan. See Stair, 3. Dec. 1680, Fettermier.—Marriage being free, marrying without the father's consent, was found not to annul a bond of provision, by a father to his eldest daughter, wherein it was specified, "she marrying with his consent; and of those named by him as her curators, otherwise she should only have the sum of blank," which however, was never filled up, for the Lords found, they might fill it up, if she had transgressed the clause, and thereby restrict the provision according to the match she made; but this nomination not being shown, or known to her, the irritancy was found not incurred. Stair, 23. Feb. 1681, Hamilton.—A party having granted a disposition to his niece, with this provision, "That she should not marry without consent of certain persons therein named, otherwise the disposition to be null, and the subject to go to others;" and she having married without consent of those persons; the Lords, in a process at the instance of the substitutes against her, found it relevant to annul the disposition, that she had contravened the provision; and, they found the answer relevant, That she required the persons, by whose advice she was appointed to marry, to give their consent, and that they refused to give a reason why they would not consent to the marriage. Home, March 1682, Foord.—A daughter being bound up by a disposition from her father, to adhibit the consent of three friends, named to her marriage, and she now, about to marry a person, who was not acceptable to these friends, obtaining a deliverance from the Lords against them to consent to the marriage, otherwise their Lordships would declare her disposition valid with-

out their consent, such clauses being *contra libertatem matrimonii*; and they still forbearing to consent, the Lords found, That she had right to the tocher, notwithstanding that these friends, named by the father, had not consented to her marriage. Fount. 6. July 1688, Eleis, &c.—The Lords found, That a brother, not giving his consent to his sister's marriage, which consent, she was bound by her father's appointment to obtain, and under an irritancy of losing part of her portion, which, in that case, was to belong to the brother, did not infer the irritancy, so as to make the sum belong to him, unless he could give a good reason for his dissent. Fount. 20. July 1688, Pringle.—A man, who by his bond, granted to a young woman, in consideration of a sum assigned to him, obliged himself to pay to her such a sum, at the next term after her marriage, she always acquainting him therewith, and taking his consent thereto, was found liable to pay the money to the creditor after her marriage, altho' he was not acquainted thereof, in respect she had married regularly, with her father's consent, and there was no such quality in the assignation, which was the onerous cause of the bond. Forb. 20. July 1710, Alison.—A Lady and her husband, suing her brother for her tocher, contained in a bond of provision, whereto this quality was adjected, "That she should marry with consent of two friends named, (who nevertheless did dissent) otherwise the bond to be null;" and the defender only craving, That the nullity might be so far extended, as to restrict the tocher to a moderate provision, correspondent to what would fall to her, as her *legitima*; the Lords, nevertheless, repelled the defence, and found the defender liable in the whole tocher, and refused to modify it. Here the marriage was without disparagement. Fount. Forb. 7. July 1710, Bunting.—A man, who had given his natural daughter in marriage, to one who was nearest of kin to him, and designed to settle his estate on his grand-daughter, the only child of that marriage, and disposing his lands to a boy of his name, and to his said grand-daughter, and the heir-males to be procreated between them, and then adjecting the clause, "Who by these presents, are destinated and appointed to marry together;" and his said son-in-law,

law, the grand-daughter's father, entering to possess the lands after his death, and the boy suing him for the half of the maills, as his aliment in the mean time, and for educating him, &c. it was found, That the pursuer could not be debarred from the rents to educate and maintain him, whatever might be done if he should refuse to marry after requisition. Fount. Forb. 2. Jan. 1712, M'Rath.—A wife, being substituted by her husband, to a provision left to a child, in case of the child's death, upon condition, *si vidua manserit et non nups-erit*; the Lords found the condition lawful. Gosf. 281. Feb. 1672, Foulis.

A LADY, having renounced her jointure, with this provision, "That if it should happen
"the party, in whose favor she had
"renounced, to die without heirs-
"male of his body, or to have but one
"daughter, then, and in either case,
"the renunciation should be null;"
the Lords found the renunciation null, upon his dying without any such heir-male, tho' he left several daughters. Forb. 17. July 1712; Nicolson.—It being provided in a contract of marriage, That the tocher should return to the wife's father, in case his daughter should decease before her husband, within six years after the marriage, leaving no children, and in case her father should have heirs-male, within six years after the marriage; the Lords found the condition copulative, and that the tocher should not return, altho' the father had heirs-male within the time above mentioned, seeing the wife left a child, tho' it died within the time. Dirl. M. Jan. 1677, Baillie.

A GRATUITOUS bond, for a sum of money, with this quality, "That it should be null,
"if the granter were decerned to
"pay to a third party another sum,
"for which he was then under pro-
"cess," was found irritated and void,
by the granter's payment of that other
sum, by virtue of a decree-arbitral,
upon a submission of the process entered into by him, without consent of the conditional creditor. Forb. 5. Feb. 1708, Scot.—Unless the conditional creditor could
alledge

Condition, whether to be understood copulative or disjunctive?

Condition of being decerned, includes a decerniture by decree-arbitral.

alledge a defence whereon the debtor might have been
 assolizied from the depending plea. Forb. 12. Nov.
 1708, *inter eosd.*

A DAUGHTER, suing for her provision, which was
 due to her, failing heirs-male of the
 granter's marriage, was repelled; the
 father and mother being both alive,
 tho' the father had even been a long
 time furious, and the mother past fifty.
 Stair, Dirl. Gosf. 21. June 1672, Car-
 stairs.

*Condition, si
 sine liberis, not
 purified while
 the marriage
 subsists.*

A BOND, bearing a clause, " That it should be void
 " and null, if the creditor died with-
 " out heirs of his own body, before
 " the sum be uplifted ;" and the cre-
 ditor having so died, but, before his
 death, having intented suit against a
 third party, who had undertaken the
 burden of all the granter's debts ; the
 Lords found, That the creditor's suing
 did sufficiently declare his purpose and intention to up-
 lift that sum, and being delayed by that third party, the
 condition was purified ; so that it was the same thing as
 if it had been uplifted. Fount. 20. Jan. 1697, Scot-
 toun, &c.

*Condition, that
 a bond shall be
 void if not up-
 lifted, is not
 purified if a de-
 mand be made.*

A PARTY granted a bond of tailzie, whereby
 he obliged himself, if he succeeded
 as heir to his father, to resign in fa-
 vors of himself, and the heirs of his
 own body, &c. ; which failing, to a bro-
 ther of his, with irritant clauses, *de non
 contrahendo debitum, et non alienan-
 do, &c.* After six years, the granter's
 father, in the granter's contract of
 marriage, dispones the estate to him, without mention
 of the tailzie or irritant clauses, but, on the contrary,
 containing provisions inconsistent with the same. The
 Lords, in a declarator, at the instance of the substitute,
 found, That the succession being put in another chan-
 nel, by the contract of marriage, the tailzie was not o-
 bligatory nor effectual now, it being mainly designed
 in the event of his succeeding as heir, which never ex-
 iced, seeing he got the estate *præceptione hereditatis*,
 by

*Condition of
 succeeding as
 heir, not puri-
 fied by the heir's
 obtaining a dis-
 position.*

by a disposition in the contract of marriage, clogged with no irritancies, but rather containing clauses inconsistent therewith. Fount. 25. June 1701, Borthwick.

CONDITIONAL clause. Stair, 10. July 1672, Schaw.

A MAN's heir, having ratified a bond granted by his predecessor, and also a legacy left to another party, obliging himself in the bond of ratification to pay the legacy, upon condition "the party to whom

Effect of a resolutive condition.

"the bond was granted, should relieve the estate of all other inconveniencies, otherwise, his said obligation to be null;" the estate was afterwards distressed for a great sum; yet the Lords found, That the said resolutive condition was to be understood, so that the bond should not be void altogether, but only effeiring to the distress. Dirl. 12. Dec. 1676, Durham.

A MAN, giving an obligation to his wife for a sum of money, on condition that she should renounce her liferent; and she not renouncing, but, after his death, taking infeftment, tho' on advice that she might do it for security, without being thereby excluded from chusing; and, dying without receiving any of her liferent, it was found her executors had title to the sum. Falc. vol. II. p. 39. Prentices, 17. Jan. 1749.

Later decision.

CONTRACT, when conditional, when mutual? See *Mutual contract*,

————— *For the meaning of conditional clauses.*
See *Clause*.

————— *Bond of provision, donations mortis causa, legacies, &c. if they imply the condition of survivorance?* See *Implied condition*.

————— *Where the question is, Whether the clause imports a proper substitution, or a conditional substitution?* See *Substitute and conditional institute*.

CONFIRMATION.

No real right established by an infestment a me, until it be confirmed.

AN infestment of annualrent was found null, *ope exceptionis*, because granted to be holden of the king, and not confirmed. Hope, (*Confirmation*) 8. March 1620, Balmerino.—A party, being served heir in general to the receiver of a disposition, (who died infest a me, without the superior's confirmation) and having renounced and discharged the disposition; the Lords found, That the whole right, in the deceased's person, was conveyed by the general service to the heir, and the heir's discharge and renunciation was found to be a mid impediment, and an effectual stop to any subsequent confirmation of the infestment a me, in hindering it to operate *retro*, and to validate the infestment of another, upon a special service, as heir to the obtainer of the disposition. Forb. 10. July 1713, Douglas.—Before confirmation, the lands are understood to be in non-entry. Bal. (*Non-entry*) 6. March 1566, The Queen and Home. 27. Jan. 1530, The King.—*In favorem* of a relict's infestment upon her contract of marriage, for her liferent-right, a base infestment to be holden of the superior, not confirmed, is sufficient against a singular successor publicly infest. Gilm. 15. Jan. 1663, Campbell.

SASINE being taken upon an obligation for infesting a se et de se, without relating specially to either, a posterior confirmation was found to perfect the sasine a se, not only from the confirmation, but from the date of the sasine. Upon this footing, the creditor, in an annualrent-right, having deceased before confirmation, the annualrent-right was found to be in the superior's hands by non-entry, who confirmed the same. Stair, Fount. 15. July 1680. Bishop of Aberdeen.—A superior, confirming an infestment indefinitely, which had been taken both *de me et a me*, conform to clauses in a disposition for that effect, was presumed to confirm the infestment a me, to make the right public, and he was preferred

preferred to the casualties. Harc. (*Ward*) 15. Feb. 1686, Lord Chancellor. Harc. (*Infeftments*) June 1687, Bothwel.—A purchaser of lands, charging the seller to purge divers infeftments of annualrent on these lands; the Lords found the infeftments holden base of the granter might be sufficiently extinguished by resigning *ad remanentiam*, in the seller's hands, who was the superior, and registering the same, but, *quoad* the confirmed ones, their Lordships found, That the confirmation made them public, tho' the sasine did not specially relate to the charter or holding *a me*, but was indefinite. Fount. 25. July 1699, Oliphant.

CONFIRMATION was found valid, being granted at any time, either before or after the disposer's or disponee's decease, providing there was no intervening impediment, of any other more lawful right, made by the disposer before the confirmation. Dur. 17. July 1634, Johnston.

Confirmation may be granted quandocunque.

IT was found, That a creditor, confirming his author's base infeftment *ad hunc effectum*, allenarly to make his own valid, confirms the relict's infeftment also, which was *in eodem corpore juris*. Gilm. 15. Jan. 1663, Campbell.—In a contract of marriage, an estate being disposed to the husband and wife, in conjunct-fee and liferent, upon which the husband and wife were infeft, holding *a me*; a confirmation granted to the husband, was found to accresce to the wife, so as to validate her infeftment in a competition with real creditors. Fount. 22. July 1708, Riccarton. Forbes observes this decision differently.—Confirmation of a charter granted to a son, to be holden of the superior, was found a virtual confirmation of a liferent, reserved to the father in the charter, and the father's liferent escheat was found to belong to the subject superior, and not to the king's donatar, who contended to be preferred, as if the father's liferent was a personal right, and held of no superior. Dur. 4. Dec. 1635, Craigevar.—A party, before his committing perduellion, having resigned his estate in favor of himself in liferent, and his son in fee, adding this general clause, “ With and un-
“ der

Confirmation of the radical right, if it validates all the branches?

“ der the conditions and provisions contained in the procuratory of resignation;” and having, in that procuratory, expressly reserved his lady’s liferent infestment; the Lords, in a competition between her and the donatar of the forfeiture of her husband, found, That tho’ the reservation in the public infestment was in general terms, yet that the lady’s liferent, being particularly reserved in the procuratory of resignation, to which the general clause related, was equivalent to a confirmation; and therefore they preferred the Lady to the donatar. Home, March 1684, Fount. 17. March 1685, Maine.

A CONJUNCT infestment, granted to man and wife, to be holden of the crown, being null

*What rights
require confir-
mation?*

for want of confirmation; it was argued for the wife, That her interest needed no confirmation, it resolving into a liferent, which is but a personal servitude; but was repelled. Stair, 16. Jan. 1663. Tenants of Kilchattan. Stair, 23. July 1669, Gray.

IN case of double alienation of lands, the first being to a bride, *secundum tenorem charte*

*Competition
among rights
confirmed.*

conficienda, the last, tho’ posterior, having obtained the first confirmation from the superior; the Lords preferred the same, and found, That the date of

the other confirmation could not be drawn back to the date of the alienation. Col. 12. July 1580, Polmaise.—

An infestment, for relief of cautionry, becomes perfect, if the failure be committed; and it being first confirmed, it will prevail against an anterior infestment confirmed thereafter. Had. 25. Jan. 1611, Pitfirren, &c.—In a

competition between two infestments, the first confirmation was preferred, and the bare giving in of a signature to the exchequer, was found not sufficient, unless all diligence had been used by the one, or precipitation by the other. Stair, 6. Dec. 1678, Miln.—The confirmation first expedite thro’ the seals, found preferable, tho’ the date of the charters were the same. Stair, 26. Feb. 1680, Clackmannan.—In a competition among creditors

on a bankrupt estate, the Lords found, That a confirmation having first passed the seals, was preferable to another confirmation, tho’ it was long before past in exchequer. Home, March 1682, Kincardine’s Creditors competing.

competing.—In a competition of confirmations, which are consummated by sealing, the first appending of the seal to the charter regulates the preference, tho' the confirmation, and charter in exchequer be posterior, unless it appear, that the keeper of the seal was *in mora*, by an instrument taken against him, and the thing be quarrelled *de recenti*. *Harc. (Infeftment)* 8. July 1691, Sinclair.

THE right of a deceased's moveables, vests in the person who might have confirmed them, by his obtaining possession. *Falc. Later decisions.* vol. I. p. 6. M'Whirter, 14. Nov. 1744.

A DECREE-dative, whereon confirmation does not follow, does not vest the succession in the nearest of kin, so as to transmit to their representatives. *Falc. vol. I. p. 50. Carmichael*, 23. Jan. 1745.

A PARTIAL confirmation of executors, nearest of kin, establishes their right to the whole dead's part. *Falc. vol. I. p. 52. Executors of Murray*, 23. Jan. 1745.

THE subject of a trust, must be confirmed, by the representative of the *fidei-commissary*, before he can oblige the trustee to denude. *Falc. vol. I. p. 73. Boyes*. 12. Feb. 1745.

THE relict of a person of quality pled, That a sum found in the deceased's repositories, and *bona fide* applied by her to the maintenance of the family to a term, ought not to be confirmed: It was found, it ought to be confirmed, but allowed to the executors. *Falc. vol. I. p. 186. Balmerino*, 18. Dec. 1746.

CHILDREN, attaining possession of their mother's third of moveables, need not confirm the same, in order to bar those who, upon their death, shall become nearest of kin to the deceased's wife. *Home*, p. 395. M'Quhirter, 21. July 1743.

AN infant, surviving his mother, and then dying, transmits her third of moveables to his father, tho' he neglected to confirm his child's third or to make any division thereof, the father's possession being deemed the child's. *Home* p. 412. *Bairds*, 3. Feb. 1744.

A DISPOSITION being granted to one, and the heirs-male of his body, a charter, by the superior, without resignation, confirming the disposition to the donee,

nee, in liferent, and to his son in fee, with infeftment thereon, constitutes the son fiar. Fac. Col. vol. II. p. 477. Grieve, II. Dec. 1760.

CONFIRMATION operates a discharge of the superior's casualties. See *Implied Discharge*.

CONFIRMATION makes not a base infeftment public. See *Base infeftment*.

DEEDS that have the force of a confirmation. See *Virtual confirmation*.

CONFIRMATION of testaments, as to the subjects that require confirmation. See *Service and confirmation*. As to the place where. See *Forum Competens*.

C O N F U S I O.

A CREDITOR, in a moveable debt, coming to be executor to his debtor, the Lords found, That he could have no action against the heir for the debt, because both creditor and debtor were confounded in one person. Auch. (*Executor*) 18. March 1630, Hart.—An executor cannot take assignation to a debt due by the deceased, and then transfer it to another creditor, in order to his having action against the heir; and the assignee cannot insist against the heir for payment, until he first accompt for his cedent the executor's intromissions. Auch. (*Executor*) Dur, 18. March 1630, Dalgermo.

AN apparent heir having purchased in an adjudication of his predecessor's estate, led upon the apparent heir's own bond, brought a process, upon that title, against some havers, for exhibition of the rights and evidents of the lands, and delivery thereof. The defender alledged, absolvitor, because the adjudication was extinguished *confusione*, which was repelled. Stair 10, July 1662, Ker.—A person having apprised lands on a bond granted by the apparent heir, and the apprising coming afterwards in the next heir's person, who was liable *passive*, this heir assigning the apprising to a third person, and he excluding the creditors by it; the Lords found, That the apprising, having been once in the apparent heir's person, it was thereby extinguished, so that he could not transmit it to a third party. Fount. 21. July 1697, Johnston.—Tho' an apprising, during the legal, purchased in by the heir served, becomes thereby

thereby extinct *confusions*, it is not the same, where it is purchased in by the heir having a disposition of the apprised lands, tho' thereby liable to the debt apprised for, *præceptione hæreditatis*, because *præceptio hæreditatis* is not an universal passive title, nor does the heir thereby become *eadem persona cum defuncto*. Fount. 24. Jan. 1694, Burnet.—An apparent heir liable *passive* upon behaviour, having purchased an apprising upon his predecessor's estate, while the legal was current, and conveyed the same to a singular successor, the same was found effectual in a competition, and not extinguished *confusione* in the apparent heir's person. Home, 27. Jan. 1728, Murray.

A DECEASED's personal creditor, succeeding as heir to him, the Lords found that he may yet sue the executor for the debt, which was not found taken away *confusione*. Had. 20. July 1610, Johnston.

A GENTLEMAN, having disposed the bulk of his estate to his second son, and certain heirs of tailzie, with the burden of relieving the heir of line of the debts; and after the eldest son's death, without issue, the second son being served heir both of line and provision, the obligation, for relief, was found not extinguished in his person, tho' he was both heir and creditor in the said relief: and therefore his heir of line, who was also heir of line to the maker of the tailzie, was found to have relief against the heirs of provision, so as to have the unentailed estate disburdened of all the debts. Stair, 21. Dec. 1680, Cunningham.

IN the year 1683, Alexander Irvine of Drum, made a tailzie of his estate in favor of himself and the heirs-male of his body; whom failing, to certain other heirs-male named. In the year 1687, the said Alexander Irvine, did execute a bond of provision for the sum of £. 80,000 Scots "to his second son Charles, and the " heirs-male of his body; which failing, to the o- " ther heirs-male of the persons nominated and de- " signed by him to succeed in his lands and heritages." The heirs-male of the entailor's body, having failed, the succession, both of the entailed estate and of the bond, devolved upon Alexander Irvine of Murthill, who was accordingly served heir of tailzie to the said estate, but did not expedite any service to the said bond of provi-
sion.

sion. After his decease, his son and apparent heir, granted a bond for L. 10,000 Sterling to a trustee, who thereupon charged him to enter heir of provision to Charles, in order to make up a title, by adjudication, to the L. 80,000 bond; and having thus established the bond in his person, he again charged the apparent heir to enter heir of tailzie in the estate of Drum; and obtained an adjudication against the estate for the said debt of L. 80,000. In a process, at the trustee's instance against the heirs of entail, concluding, That the bond of L. 80,000 Scots, was a subsisting debt, and did effectually burden the entail'd estate of Drum; the Lords found, That the heir-male of Murthill, being served heir to the estate of Drum, his service did not state him in the right to the L. 80,000 bond, so as to operate a confusion in his person, and that this Drum, being charged to enter heir in special to Charles, and adjudication having thereon followed, did not operate a confusion of debtor and creditor in this Drum's person; and therefore found, that the said bond of provision is not extinguished, but is still a subsisting debt upon the estate of Drum. 4. Jan. 1726, Cumming.

A CREDITOR, in debts affecting an entailed estate, succeeding as heir of entail in that estate, the debts are not extinguished *confusione*. Fac. Col. vol. II. p. 101. Gordon, 1. Dec. 1757.

APPARENT heir applying the rents for purchasing an adjudication, operates an extinction. See Payment.

CONQUEST.

Clauses of conquest, how far extended? A PERSON, by contract of marriage, became bound to infest his wife, in the conjunct-fee of all future conquests, and acquiring thereafter lands holding gage, which, by acts of the town, could be enjoyed only by burghesses, their heirs-male, &c. his heir was ordained *præstare damnum et interesse* to the relief. Had. 14. March 1623, Skeen.—A husband, being bound, by his contract of marriage, to infest his wife in all lands and heritages he should conquest during the marriage, and having, during the subsistence thereof,

thereof, first acquired tacks of certain lands, and some years thereafter, the heritable right thereof, she was found to have right only to the rents of the lands, as payable by these tacks, but not to the profit accruing from the tacks, in respect there was no express stipulation in the contract, providing her to the liferent of tacks, or other securities, purchased during the marriage.

Dur. 12. March 1628, Lady Dumfermline.—A husband, being bound to infest his wife in the conquest of all lands, annualrents, &c. and having lent out money upon annualrent, bearing no clause of infestment, yet it was found, that the clause comprehended this subject.

Dur. Spot. (*Husband and wife*) 20. Feb. 1629, Douglas.—Found, that an obligation, in a contract of marriage, to provide the wife to a liferent of what lands, teinds, annualrents, &c. (not mentioning sums of money) should be conquest during the marriage, was found not to extend to the annualrent of moveable sums.

Harc. (*Contracts of marriage*) Feb. 1682, Aitken.—Found, that an obligation to provide a wife to a third in liferent of lands and heritages, to be conquest during the marriage, did comprehend a sum belonging to the heir, by a clause secluding executors, as falling under the word *heritage*. Harc. (*Contracts of marriage*)

March 1682, Prestongrange.—A clause of conquest, providing to the wife the liferent of all lands, annualrents, goods and gear, conquest during the marriage, was found not to extend to bonds, unless the wife could prove, that they came in place of, and were purchased by the goods and gear acquired during the marriage. Stair, Gosf.

15. July 1673, Robison.—The daughters of a second marriage being served heirs, in virtue of a clause in their mother's contract, bearing a provision "of all goods and gear to be conquest during the marriage, to the children therein procreated;" in a reduction of this service, by the children of the first marriage, it was found, that these words, in the clause of conquest, could not extend to houses, unless it had also born lands and heritages.

Fount. 5. Feb. 1696, Young, &c.—In a contract of marriage, there is a provision of conquest, in favor of the bairns of the marriage, in the common stile, of all that the husband should conquest or acquire during the marriage. During the standing of the marriage, the husband got left him, as a pure donation, by way

of legacy, the sum of 12,000 merks; and the question thereupon occurred, Whether this was comprehended under the above clause of conquest? The Lords found it was not. July 1730, Mercer,—The like; Stair, 29. Jan. 1678, Stewarts.

A LADY, being provided in her contract of marriage, to the liferent of the conquest during the marriage; her husband having accordingly purchased some lands, but infest his son therein, without any reservation to himself; yet these lands were found conquest in the father's person, *ad hunc effectum*, to give the Lady the liferent thereof, altho' the price was still

unpaid, and the son, as heir to his father, was bound to pay the same, and yet the Lady to have the liferent of the lands. Spot. (*Husband and Wife*) 3. June, Dur. 3. July 1627, Dunfermline.—Yet, in a case parallel to the preceding, the heir having paid the price after his father's death, and retired the bond granted by the father for the same; the Lords found, That the heir ought not to provide the relict in the liferent thereof, but with the burden of paying annualrent for that sum unpaid by the deceased; the reason of which was, That the bond granted by the deceased expressly bore, to be for payment of the sum owing by him for the price of these lands. Dur. Spot. (*Husband and Wife*) 24. Jan. 1629, Renton.—The like; Stair, 20. Dir. Gilm. 21. Dec. 1665, Dickson.—A clause of conquest, in a contract of marriage, in favor of a wife, of all lands, sums of money, &c. to be purchased during the marriage, extends only to what the husband acquired, during the marriage, more than what he had at the time of the contract, and with the burden of all his debts contracted during the marriage. Stair, 27. June 1676, Dunfermline.

Subjects purchased; partly before, partly after the marriage, how far reputed conquest?

A WIFE, being provided to all conquest during the marriage, the Lords found a reversion, used after the said contract, to be of that nature, and that therefore the benefit thereof ought to be disposed to the wife, by virtue of the said clause. Hope, (*Husband*) 19. July 1627, Dunfermline.—The Lords found, That new rights acquired, during

ring the marriage, to lands, which the purchaser had some right to before the marriage, by expired comprisings, or irredeemable dispositions, are not to be reputed conquest; so that such supervenient rights, tho' preferable, accresce to the former, and are but the completing of a conquest begun before the marriage. Falc. 6. Feb. 1683, Wauchop.—There being a clause in a contract of marriage, whereby, in case of no children, the conquest was to divide between the husband's and wife's heirs; and the wife having, in the said contract, disposed her lands to her husband in liferent, and heirs of the marriage in fee; which failing, to her own heirs; and thereafter, during the marriage, having, for most onerous causes, disposed the said lands to her husband, absolutely; this acquisition was found to fall under the clause of conquest, tho' the husband was *ab ante* liferenter: and therefore, there being no heirs of the marriage, the one half was adjudged to belong to the wife's heirs. Fount. Forb. 12. Dec. 1707, Fergus.—A deceased having been bound to infest his Lady in all his conquest, it was found, That the lands wherein he was infest before the marriage, being sold to a vassal, whose feu was never confirmed (and so, whose right being kirk-lands was null, and would not have excluded the deceased) the acquiring of this feu by the husband, after the marriage, from the said feu, was not conquest, seeing the feu was null, and could not be understood as an acquisition, the husband standing in the absolute right before, both of property and superiority. Dur. 30. June 1629, Dunfermline.

A WIFE, by contract of marriage, being provided to the liferent of what the husband should conquest, or, of what sums he should receive payment of during the marriage, was found not entitled to the liferent of sums conquest during the marriage, which had been applied by the husband for purging incumbrances on his estate. Hare. (Contracts of Marriage) Collington.

Sums conquest, but applied for purging incumbrances.

A PROVISION to a wife in a contract of marriage, of liferent of all sums to be acquired by the husband, and taken to himself and to his heirs; this clause was found to comprehend the

Rights conquest but taken in favor of younger children.

liferent

liferent of sums, the fee whereof was provided to the second son. Dur. 16. July 1625, Knox.—An obligation to provide the wife in liferent of all sums conquest, was not extended to certain sums which the husband had taken the debtors bound to pay to some of his younger children, but only to those which he had acquired to himself and his heirs. Dur. 10. Feb. 1629, Oliphant.

IT was found, That lands, conquest and sold again, do not fall under the clause of conquest in a contract of marriage. Also, a feu being acquired and disposed again to the said feuer for a greater feu-duty, the augmentation of the feu-duty only was reputed conquest. Dur. 26. Nov. 1629, Dunfermline.

BY contract of marriage, the husband having bound himself to employ 3000 merks for his wife's liferent use, and, by a posterior clause, provided her to the liferent of all lands conquest during the marriage; it was found, That this clause of conquest, could only be understood of what was conquest, more than answerable to the annualrent of the 3000 merks. Stair, 4. Jan. 1672, Beattie.

HOW far the husband is bound by clauses of conquest. See Provisions to heirs and children.

CONSIGNATION.

A PURCHASER of land, having granted bond for the price, which he could not directly pay, because of incumbrances; the seller, some terms thereafter, intimated to him, he would be ready to receive the price at Whitsunday then next. The money was accordingly offered at the term, but incumbrances not being purged, the purchaser took a protest for cost, skaith and damage, and to be free of interest, in regard he was to consign the money, which he accordingly did, in the hands of a private banker. The Lords found him free of interest, tho' it was pled, There could be no regular consignation, except upon a suspension in the hands of

of the clerk, from whom the creditor has access to demand the money by authority of the court. 1. Feb. 1738, Robertson.

UPON *whom lies the hazard of consigned money?* See Periculum.

CONSIGNATION *in order to redemption.* See Redemption.

CONSOLIDATION.

THE Lords found, That a servitude of thirlage being once consolidated with the property, cannot be understood to revive again, when any party of that property is alienated, unless it be so expressed. Sinc. 1. July 1542, Innes.—There being a servitude upon a whole abbey, prestable to the forrester, he having the lands himself, and disposing or excambing the same, without reservation of the servitude; the Lords found the lands free thereof. Gosf. 29. Jan. 1670, Home.

A TACKSMAN, acquiring the property of the lands from the setter of the tack, may, after the infeftment is taken out of the way, recur to his tack to defend himself against a third party. Hope, (*Tack*) 12. March 1628, Dunfermline. Mait. Spot. (*Dominion*) 6. Feb. 1566, M'Doual. Had. 23. Feb. 1610, Hamilton.—The like, found against the donatar of the setter's liferent escheat, who had reduced the infeftment as granted *in cursu rebellionis*. Dur. 11. Dec. 1634, Lessmore.

A MAN, having acquired double infeftments, as is usual, and having taken infeftment public by resignation, to be holden of the superior; and that infeftment, being thereafter reduced, at the instance of a third party; the Lords found, That he could not return and defend himself in a removing by the other base infeftment, but that the public one made the base to cease. Dur. 3. July 1624, Annandale.—A father, having infeft his son in his estate, to be holden base of himself, and the son dying, so that the father succeeding again to him, and serving himself heir, but doubting how to infeft, being both superior and vassal, and if he could direct precepts to infeft himself; the Lords, on a bill given in by him, directed precept to the sheriff of the shire to infeft him: but,

but, thereafter, their Lordships found, That he needed no new infeftment, but that his old one reconvalesced, and his retour consolidated the property with the superiority, without a fasine. Fount. 23. July 1687, Elies supplicant.

AN estate being disponed to an eldest son in his contract of marriage, and to the heirs-male of his body; whom failing, to the heirs-female of his body; the said eldest son, after the father's decease, neglecting to infest himself upon the disposition in the contract, made up his titles as heir of the investiture. Again, after his decease, his son made up his title also as heir of the investiture, and thereupon made a gratuitous conveyance of the estate. The heirs-male of the marriage having failed in him, the heir-female was served heir of provision in general, upon the contract of marriage, and thereupon claimed the estate, upon this medium, That the gratuitous disponee can be in no better situation than the heir general, or the heir of investiture, who would be bound by the deed of his predecessor, granter of the disposition in the contract of marriage. It was answered, That the disposition, being in favor of the apparent heir, was absorbed by his making up titles to the estate as heir general; and that it would be an useless form to oblige him to infest himself over again upon the disposition in the contract, or to oblige his son to serve heir of provision to him in general, in order to carry the provision in the contract, as this would not make the estate more amply theirs, than it was by their making up titles as heirs of the investiture. The Lords repelled the allegation, That the right of the contract of marriage was not established in the person of the heir, in respect of the answer, That the real right of the estate was established in his person. 6. July 1736, Edgar.

A PROPRIETOR made a tailzie of his estate, at a time when there was a proper wadset upon part of it, and the wadsetter publicly infest; the heir of entail afterwards purchased in the wadset, and took the same to himself, his heirs and assignees whatsoever. The question occurred between the creditors of the purchaser, and a posterior heir of entail, Whether this wadset was fopite, and the whole lands subjected to the entail, or if it was a subsisting right, and a different subject from

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the entailed estate, affectable by the creditors of the heir of entail? The Lords found the wadset affectable by the creditors. 4. Feb. 1736, Peterborrow.

CONSUETUDE.

A SASINE, within burgh, was sustained, tho' granted by one who was not town-clerk, and tho' there was another, in regard, the giver was habite and repute town-clerk, and was in use to give sasines. Hope, (*Sasine*) 15. July 1615, Douglas.—A bond, subscribed by two notaries, whereof the one was hanged for not being one, yet because he was *tentus, habitus et reputatus*, it was sustained, being for a small matter. Had. 16. Jan. 1610, Spence.—The like; Mait. 6. May 1553, Cunningham.—An execution being quarrelled, because the messenger was deprived; this found not relevant, unless the deprivation was published at the market-cross of the head burgh where the messenger dwelt. Had. 4. June 1608, Sommervell.—An execution, by a deposed messenger, was sustained, he being holden and repute, at that time, as a messenger, and officiating as such. Stair, Gosf. Dirl. 10. Nov. 1676, Stewart.—A messenger's execution being quarrelled, because he was deprived, and the deprivation published at the market-cross of Edinburgh, it being for no malversation, but deficiency in paying the Lyon's dues, and being still habite and repute a messenger; the Lords repelled the objection, and sustained the execution, notwithstanding thereof. Fount. 11. July 1699, Learmonth.—A nullity, objected to an execution of poinding, was sustained, *sciz.* That the poinding was performed, and the execution thereof subscribed by a person, who was, by the Lyon-office, deprived from being a messenger at arms, and his deprivation intimated, or advertised in the public-news papers, prior to the poinding. 18. Feb. 1732, Hunter.

IN a competition of creditors, an objection was laid against a decree of forthcoming. That it was pronounced by the magistrates of Edinburgh, against inhabitants of the Canongate, over whom they had no jurisdiction; the Lords were of o-

Habite and repute a messenger, &c.

Judge acting extra territorium.

pinion.

pinion, That the bailies of Edinburgh had no jurisdiction on over the inhabitants of the Canongate; yet they sustained the decree upon use and wont, the bailies having been in the constant custom of exercising such a jurisdiction; but they concerted an act of sederunt, discharging such jurisdiction in time coming. July 1730, Blair.—A decree recovered before the magistrates of Edinburgh, against an inhabitant of the Canongate, held as confest, upon a citation *pro confesso*, was, after his decease, found intrinsically null, the defender not having been subject to the jurisdiction; as one cannot be understood as contumacious, in not answering to a citation before an incompetent judge, *extra territorium judicanti impune non paretur*; and the Lords did not regard the *communis error*, and constant consuetude of the magistrates of Edinburgh, exercising a jurisdiction over the inhabitants of the Canongate, which might be sufficient to support diligence upon a debt habilely constituted, which is favorable, but can never be sufficient to found a debt, where there is no other document, except the decree itself. 17. Feb. 1736, Leggat.

A DECREE, and precept of poinding, was sustained, tho' pronounced in Christmas vacance, *Judge acting in foriat time.* because inferior judges used to sit frequently, and administer justice in such times, wherefore, the Lords thought it hard to annul their proceedings: but here this was sustained for purging of a spulzie, which is odious. Dur. 5. Dec. 1635, Sutor.

LANARK is the head burgh of the sheriffdom of Lanark, where executions are lawful against all persons, dwelling within the shire, because, altho' there are two wards, yet there is no distinct jurisdiction, judge nor clerk. But a denunciation of a man of the nether-ward, at Rutherglen, will not be found null, by way of exception, in respect of the custom, to denounce thereat. Had. 14. Feb. 1610, Cairncrofs.—In a shire, where there are no royal burghs, but a certain place appointed by act of parliament, for denunciations upon hornings; and a party not having denounced there, but at another place, where denunciations were frequently made, since that act; the horning was sustained,

sustained, notwithstanding the act, in respect of the said posterior custom. Dur. 16. June 1626, Prior of St Bathans.—A poinding, executed at a place that was neither head burgh of the shire, nor regality, sustained, because of the frequent custom to poind there, the head burgh of the regality being 24 miles distant. Dur. 18. March 1630, Chisholm.—An inhibition not found null, for being executed within the shire of Berwick at Dunse, and not at Greenlaw, notwithstanding of the act of parliament, appointing Greenlaw to be the head burgh of the shire, and that because of the consuetude, and the said act, was only a private act, never printed, nor known in the country. Dur. 7. March 1632, Dickson.—An inhibition being quarrelled, as not duly executed at the head burgh of the regality of St. Andrews, it was offered to be proved, That legal diligences against these lands were usually executed at Strathern, which is sufficient to maintain the execution quarrelled. Reply'd, *Non relevat*, that diligences were indifferently executed at Strathern or St Andrews, unless the defender will offer to prove, That, for the space of 40 years, all diligences, concerning the saids lands, were executed at Strathern; for if any one execution has been made at St Andrews, within the 40 years, it preserves the privilege of the regality, conform to act of parliament. The Lords found it relevant to support the inhibition, that for the space of 40 years, all diligences concerning these lands, were executed at Strathern, and not that executions were made promiscuously at Strathern and St Andrews. Harc. (*Inhibition*) March 1685, Crawford.—In a competition, it was objected against an inhibition, led against an inhabitant of the town of Kirkcaldie, That it was executed against the lieges at Coupar, the head burgh of the shire, whereas it ought to have been executed at Dunfermline, the head burgh of the regality, within which Kirkcaldie lies. It was answered, That *communis error facit jus*, and it was commonly understood, that the town of Kirkcaldie was not within the regality of Dunfermline; for a proof of which, a condescendence was given in from the 1644, downwards, by which it appeared, that most of the diligences, against the inhabitants of Kirkcaldie, were executed at the head burgh of the shire, many of them at both the head

burghs of the shire and regality, and half a dozen of them at the head burgh of the regality only. On the other hand it appeared, That a great number of the processs, had been carried on against the inhabitants of Kirkcaldie, before the regality court; and it was pled against the inhibiter, whatever might be the case, were the question only with the debtor, yet in a competition of creditors, every objection ought to have its full weight. The Lords sustained the objection against the inhibition, that it was not executed at the head burgh of the regality. 20. Feb. 1733, Hay.

A VASSAL of a regality was unlawd, for his not compearance at his superior's head-court, tho' holden at another place than was contained in his infeftment, because of 30 years custom to keep the courts at that place. Had. 7. Dec. 1622, and 12. Feb. 1623, Innes.

IN a competition, for the rents of a house within burgh, between two real creditors, this nullity being objected, That, in the resignation made in the magistrates hands, the symbols were earth and stone, whereas their fixt and known symbols are staff and baston; the Lords having tried at the town-clerk's office, and finding there were many in the same condition, did sustain the sasine and resignation, and repelled the nullity; but resolved to make an act of sederunt, discharging that practice in time coming, under the pain of nullity, in all competitions with other creditors, more formally infeft. Fount. 7. Feb. 1708, Young.

SASINE of a tenement in Leith, tho' not registred in the general register, but given by the bailies of Edinburgh, was sustained, tho', as not being a royal burgh, that place did not fall under the exception of the act of parliament 1617, anent registration of sasines. But this was sustained, in respect of the constant custom of giving such sasines by the said bailies, and because of the danger that many of the lieges rights would fall into, if this nullity should take place. Dur. 10. July 1623, Edmiston.

IT being the custom of a burgh, that all reversionss should

Should be under form of instrument taken in the town-clerk's hands; the Lords sustained the same, altho', regularly, reversions cannot be valid, unless subscribed by the party. *Deed executed in a wrong form.* Mait. 15.

June 1554, Galloway.

A DECREE of lyming, given by the provost and bailies of Dunfermline, was reduced, because the brieve was not proclaimed upon fifteen days, nor a precept directed upon a claim given in by the purchaser of the brieve, to summon the special parties having interest thereto, nor any formal order of process kept; tho' it was alledged to be conform to the ordinary custom and manner of proceeding in that burgh. *Process carried on in a wrong form.* Dur. 13. Feb. 1629, Wright.—Decree

subscribed by the commissary, in place of the clerk, sustained, because of the custom, but found the custom not right, and therefore not to be sustained in time coming. Dur. 10. Feb. 1631, —An admiral's decree, in

absence, for not finding caution *judicio fisci et judicatum solvi*, was found null, and turned into a libel, upon this ground, That the decerniture or warrant thereof, was not signed by the judge, notwithstanding, that by the custom of the court, the judge had not for a long time signed any such decernitures. Forb. 15. July 1708, Houston.

WHERE access to a house, or chambers set in tack, is required ten days after the agreed term of entry, but not given for twenty days, so that the tacksmen comes to be obliged to take another lodging; he is free from the tack, and cannot be obliged to pay the rent, tho' it be proved, That by the custom of the place, entry to the possession of such lodgings, is not commonly given sooner than twenty days after the term. *Term of entry.* Dur. 20. July 1633, Brown.

A DECREE, by the provost and bailies of Edinburgh, found intrinsically null, without necessity of a reduction, being given against the suspender, holden as confess, because the town officer's execution, by which he was cited to give his oath, wanted witnesses, *Informal execution.* tho'

tho' it was alledged, That in the burgh of Edinburgh, the form was, that no executions had witnesses, but that the officers were sworn in judgment upon the verity of their executions; which form, the Lords would not allow, because thereby the ordinary mean of improbation, viz. by the witnesses, was taken away. Dur. 17. June 1624, Crawford.—The like, where the custom was to cite parties, without any written execution. Dur. 25. July 1626, Dickson.

THOUGH, by the general custom of Scotland, sentence-money belongs to the judge, yet the Lords found, That the particular custom of one place derogates from the general, and that being proven, they preferred the clerk. Fount. 11. Dec. 1684, Catheart,

Sentence-money.

C O R P O R A T I O N.

THE visitor and collector of the malt-men calling of Glasgow, sued Robert Tenant, inn-keeper there, before the magistrates, who gave decree, fining him in L. 20 Scots, for making malt, without being entered with the calling; which he suspended, for, that by act 29. parl. 1567, ratified by act 15. parl. 1669, it is statuted, "That malt-men should be no craft, nor have a deacon."—The Lord Ordinary, 17. Nov. 1748, "Sustained the reason of suspension founded on the act of parliament, notwithstanding of a ratification past in the parliament, 1672, founded on by the chargers."—Pled in a reclaiming bill, That there was a decree-arbitral pronounced 1605, between the merchants and trades of Glasgow, by which the constitution of the town was settled, as it subsists to this day; part whereof is, That there are six malt-men, members of the convener's house; that they are capable of being chosen deacon-convener, who is a counsellor *ex officio*, and of being trades bailies: By this agreement, the malt-men, and meal-men, are allowed to have a visitor, and the burgesses, who use these employments, are obliged to pay them certain small upsets. It was approved by the magistrates, recorded in the council-books of the town, and ratified in parliament 1612, on occasion of the statute

tute 1669, the calling applied to parliament, and obtained a ratification of their privileges 1672; which they had possessed ever since, and got confirmed by the bishop 1684. In 1677, the magistrates settled the upset at L. 100 Scots.—Answered, The ratifications ought not to derogate from public law; and so was found in the house of peers, in the competition for the honour of Earl of Stair, which was resigned, and granted again by patent, to the then Earl, and any person he should name, by a writ under his hand; and failing that, to the second son of Colonel William Dalrymple; ratified in parliament. In which case, the house of peers preferred the substitute to the Earl's nominee.—The Lords repelled the reasons of suspension, founded on the acts of parliament 1567, and 1669, in respect of the ratifications 1612, and 1672, founded on by the chargers, and the possession following thereon; and found, that the malt-men calling of Glasgow, were a subsisting legal corporation: And refused a bill, and adhered. *Falc.* vol. II. p. 53. The malt-men of Glasgow. 10. Feb. 1749.

A PERSON making malt, and brewing and distilling it, is not reckoned a maltster, tho' he sold his ale and spirits as an inn-keeper, in his own house, but found him to be a maltster, if he sold any out of the house, tho' he sold no malt unbrewed or distilled. *Falc.* vol. II. p. 150. *inter eosd.* 22. Feb. 1750.

CORRECTORY LAWS.

CORRECTORY laws ought to be liberally interpreted. It is otherwise with respect to penal laws. Remark. Dec. p. 172. Sutherland, 22. Nov. 1748.

C O R R E I.

THREE persons having borrowed a sum on their joint security, and lent it on a bill payable to themselves, it was found, that two of them might sue for the whole. *Falc.* vol. I. p. 26. Gordon, &c. 15. Dec. 1744.

COURTESY.

*Who has right
to courtesy?*

HE who marries a woman who has heritage, and procreates a living child upon her, will get the curiality, altho' he be her second or third husband. Had. 7. June 1610, Spence.—The second husband of an heiress, cannot claim the courtesy, where there is a son of a former marriage alive. Fount. 1. Dec. 1702, Darleith.

*When it has
place?* **T**H^{O'} the children die before the mother, and both within the year, yet the husband has right to the courtesy. Nicolson (*Courtesy*) 20. July 1632, Stewart.

*In what sub-
jects?* **T**H^E courtesy only takes place where the wife succeeded in lands to some of her predecessors, but not where she acquired them herself, *ex titulo singulari*; and this, because of the uniformity of all our authors and decisions on this head. Fount. Forb. 22. June 1709, Lawson. 11. Jan. 1740, Hodge.—Courtesy not due in burgage-lands, because female succession has no place in burgage-holding. Bruce, 16. June 1715, Gordon.

*To what bur-
dens subjected?* **A** HUSBAND, possessing by the right of courtesy, is liable for the annualrents of the personal, as well as of the real debts. Home, 3. Jan. 1717, Monteth.

*Courtesy
may have place
where the decea-
sed heiress was
not habilely in-
fest.*

AN heiress's infestment, upon a service to her predecessors, being quarrelled by a reduction after her death, upon alledged nullities, in order to dis-appoint her husband of his right of courtesy; the Lords found, That the heiress's infestment, not having been quarrelled in her lifetime, was sufficient to support the courtesy, upon this ground of equity, That had it been quarrelled during her life, these nullities might, and would have been supplied. 15. June 1716, Hamilton.

CREDITORS

CREDITORS of a DECEASED.

Decisions upon Act 24. Parl. 1661.

UNDER apparent heirs, in act 24. Parl. 1661, are comprehended *nominatim* substitutes in bonds or other rights; so that the creditors of the institute are preferable to the creditors of the substitute. Forb. 9. Feb. 1711, Graham.

Who understood apparent heirs in the sense of the act?

THE Lords preferred the creditors of a deceased, before the creditors of his executor, as to all the deceased's moveables that were extant, tho' the act statutes solely with respect to the heritable estate. Srair, 16. Dec. 1674, Kilhead. Gosf. 29. July 1675, Hall. The like; Stair, 8. July 1664. Town of Edinburgh.

Takes place in moveable, as well as heritable succession.

IN a competition between the creditors of a deceased, and the creditors of his apparent heir, the Lords found, That the deceased's creditors, ought to do exact and complete diligence against his estate, within three years after his death, unless they can make appear, that their diligence was retarded without any fault of their's, by opposition from the heir, or other creditors, or the surcease of justice, or the like, and preferred a disposition by the heir to one of his creditors, granted within three years after the deceased's death; altho' the creditors of the deceased had obtained a decree *cognitionis causa*, within the three years, the decree of adjudication being after. Hare. (Prescription) March 1685, Ballenden. The like; Forb. 17. Fount. 18. June 1712, Scot.

What diligence necessary, in order to give preference?

THE Lords found, That the axiom, *contra non valentem agere, non currit prescriptio*, takes no place in the short prescriptions; and that the three years are not to be understood of *anni utiles*, but *continui*; and therefore, that the act cannot be ex-

The three years, how computed?

tended

tended to this case, where the term of payment fell sometime after the deceased's death, and the creditor had done diligence within three years, counting from the term of payment. Fount. Stair, 19. Dec. 1678 Pater-son.

A DISPOSITION, granted by the heir to the deceased's creditors, within a year after the deceased's death, is not quarrellable, seeing the act is conceived in favor of the deceased's creditors: Nor is a disposition, by the heir to one of his own creditors, quarrellable by another of his creditors. *Harc. (Prescription)* March 1685, Ballenden.

No bar against disposing to the deceased's creditor, even within the year.

Decisions upon the Act of Sederunt 1662.

IN a special declarator, at the instance of a donatar of escheat, comparance was made for an executor-creditor, who had confirmed the subject, prior to the gift or general declarator. It was alledged for the donatar, That as the confirmation could not exclude another creditor, doing diligence within six months after the rebel's decease, no more could it exclude the pursuer's declarator, raised within the six months. The Lords preferred the executor-creditor, in respect the act of sederunt only concerns creditors, and the donatar is *in causa pene*. *Harc. (Escheat)* March 1685, M'Reith.

A TESTAMENT, being confirmed by the deceased's creditor, and the same subject being again confirmed by another creditor, within the six months; the Lords found, That whatever defect might be in the second confirmation (as making thereby two principal testaments, which seems inconsistent) yet that it was sufficient to give the second the benefit of coming in *pari passu* with the first. Fount. 2. Jan. 1708, Ramsay.—A creditor of a deceased, having sued a vicious intromitter with the deceased's effects, the bare citation was found to give him the benefit of the act of sederunt 1662, 18. Dec. 1729, Hay.

What diligence necessary.

CREDITOR

CREDITORS of a deceased, after the six months, are preferable, according to the dates of their citations against the executor; tho' it was pled by the competing creditor, whose diligence was first completed, That, from the nature of the thing, a citation, which is only a step of diligence, can give no preference; that it is the first completed diligence, not the first inchoated, that is to be considered. *Creditors how preferable, doing diligence after the six months.* July 1723, Gray.

—An executor-creditor, having confirmed a bond, due to the deceased, containing a greater sum than sufficient to pay his debt; a competition arose upon the balance, between two other creditors of the deceased, each of them having raised a process against the executor-creditor, and insisted in their respective processes, while the executor-creditor was yet in *constituendo*, and had recovered no decree against the debtor in the bond; both citations being after elapse of the six months; the one insisted for a preference upon his first citation: the other pled, That citation makes no *nexus realis* upon the subject, and consequently is no foundation of preference; that the first decree must be the rule, and seeing no decree is yet obtained by either, they ought to be ranked *pari passu*. The Lords brought the parties in *pari passu*. 15. Feb. 1738, Græme.

THE act of sederunt 1662, ordaining, " That creditors, using legal diligence within six months of their debtor's death, by citing executors-creditors, in promitters with the deceased's goods, &c. shall come in *pari passu* with the other creditors, who have used more timely diligence, by obtaining themselves decreed and confirmed executors-creditors, or other ways," who was not intended to prefer the creditors who had inchoate diligence within the six months, before those who commenced their diligence after it was elapsed; but barely to disappoint those creditors, who, taking the start, having completed their diligence within the six months; which is done by bringing in *pari passu* with them, all other creditors who have done any sort of diligence within the six months. But the competition among creditors, some of whom have done diligence

iligence during the six months, others after, is left to the determination of the common law. Remark. Dec. p. 43. competition Creditors of Creichen. 13. Feb. 1742.

A FACTOR, appointed by the Court of Session, for the infant children of Quintin Dick, to manage the funds which belonged to him, was convened in a procel, by one of Quintin's creditors, to pay a debt due by Quintin contained in a bill. The defence was, That there was no passive title upon which he could be made liable; that the creditor had no other method but to take a decree of constitution against the infant children; and thereupon apply to the court for a warrant against their factor. The Lord Ordinary having affoizied the factor, the matter came before the court, upon a petition and answers. The judges were all clear, that there could be no necessity of taking a decree upon the passive titles in this case; and that such a decree could not pass, because no passive title could be specified against the children, who were not the intronitters. Elchies was clear, that the action was competent against the factor, as intronitter with the deceased's effects. Arnison thought it hard to give a creditor thus an opportunity of a start in diligence, where there can be no *pari passu* preference: and therefore he declared his opinion, that the pursuer ought to obtain himself decerned executor-creditor to his deceased debtor, and to confirm the moveable effects in the factor's hands, as still in *hereditate jacente* of the debtor; to which opinion, the plurality agreed. And so it was found, that the creditor must confirm. Remark. Dec. p. 135. Cathcart, 25. Nov. 1747.

ARCHIBALD GEDDES of Eifel, having died 29. August 1697, Andrew his son, and heir apparent, sold the estate to Duff of Dipple, 26. of April 1698. The father and son had joined in a bond of borrowed money to John Taylor, for the sum of L. 800 Scots; and this claim lay over many years, but was saved from prescription by the minority of the creditor's representatives. William Taylor, grandson to the original creditor, made up a title to the bond, and intuled in a process against Lord Braco, as representing Duff of Dipple, concluding for a reduction of his right to the estate of Eifel,

Effel, founded on the last clause of the act 24. parl.
 1661, " That no right or disposition, made by the ap-
 parent heir, so far as may prejudice his predecessor's
 creditors, shall be valid, unless it be made and granted
 a full year after the predecessor's death."—It was
 objected, That the pursuer, in quoting the statute, has
 left out the most material words, which introduce a
 new prescription, by providing that the creditors, to
 have the benefit of the statute, must do diligence a-
 gainst the heir-apparent, and also against the real estate,
 within three years after their debtor's death: therefore,
 no creditor of the predecessor, who has not diligence a-
 gainst his estate within the time limited, can insist upon
 this act of parliament, nor upon any clause in it; as
 Lord Stair, *lib. 2. tit. 12. § 29.* observes, where he
 says, " That the diligence must be completed within
 three years, such as adjudication or apprising, by in-
 feftment, or charge against the superior." And it is
 the author's opinion, that this prescription runs as well
 against the creditors of the predecessor, where the heir-
 apparent has disposed within the year, as where he has
 not disposed at all. In answer to this it was urged,
 That the doing diligence by adjudication within three
 years, is a clause intended to regulate the preference
 between the predecessor's creditors, and those of the
 heir-apparent, which is not the present case. The pro-
 hibition to sell *intra annum deliberandi*, is pure and abso-
 lute, and the predecessor's creditors are intitled to found
 upon it without necessity of any diligence. And to make
 it clear that this is the sense of the statute, the pursuer
 endeavoured to show, by stating first the defects of com-
 mon law, that were intended to be remedied by this
 statute; and next, by examining the remedies that were
 applied. With respect to the first, the defects which
 the legislature had in view, are clearly expressed in the
 narrative: " Our sovereign Lord, &c. taking into
 consideration, that apparent heirs, immediately after
 their predecessor's death, do frequently dispoise their
 estates in whole or in part, in prejudice of their pre-
 decessors lawful creditors, before their death come to
 their knowledge, or before they can do lawful dili-
 gence against the said apparent heirs, and which dis-
 position, the said apparent heirs do often make be-
 fore

“fore they be served heirs and infest.” Here is an evil, and a great one. During the *annus deliberandi*, an heir-apparent is protected from diligence, that he may have time for deliberating whether he will undertake the succession yea or not. It is neither just nor expedient, that, in the mean time, he should have liberty, by disposing of the predecessor’s estate, to withdraw from the creditors the subject of their payment. The other evil complained of is, “That the heirs-apparent suffer, “by collusion, their predecessors estates to be comprised or adjudged from them, for payment of their “own proper debts, real or similate, without respect “to their predecessors creditors; tho’, in justice, every “man’s estate should be liable to his own debt, before “the debt contracted by his heir-apparent.” The evils here complained of are of different kinds, and accordingly different remedies are applied. The natural remedy to the former is above set forth, that no heir, for a year after his predecessor’s death, shall be entitled to dispose of his predecessor’s estate; and consequently, that no man is secure to purchase from him within the year; at least, that the purchaser must lay his account, either to have the burden of the predecessor’s whole debts, or to have the estate taken from him by the predecessor’s creditors. The remedy to the latter is borrowed from the Roman law, *tit. De separationibus*, and, upon solid grounds in equity, gives a preference to the predecessor’s creditors upon the predecessor’s estate. But this preference is declared to subsist no longer than three years; after which period the creditors, whether of the predecessor or of the heir-apparent, shall be preferred according to their diligence. To this branch a limitation is introduced, and a most reasonable one, to give a security to the apparent heir’s proper creditors, that, after attaching the estate by diligence, they be not for ever laid open to be beat out of the possession by the predecessor’s creditors; reserving always to the predecessor’s creditors, what preference they have obtained within the three years, by the deed of the heir-apparent, or by force of diligence. The Lords found the reasons of reduction relevant and proved. Rem. Dec. p. 142. Taylor, 26. Nov. 1747.

DAMAGE

DAMAGE and INTEREST.

NO probation of a real *interesse* was allowed, where a conventional one is stipulated. Colv. July 1583, Cumming.

A PERSON, charged upon his obligation to deliver to the charger an adjudication, upon a third party's estate, by a precise day, under a penalty, by and attour performance, having made diligent search for the adjudication, in order to delivery, and not being able to find it, was found liable only for damage and interest to the charger, in so far as his right to the sums in the adjudication might have been made effectual against the adjudged estate, had the adjudication been delivered in due time. Forb. 20. June 1710, Hamilton.

A PARTY, being liable to pay certain bolls of victual between Christmas and Candlemas; the Lords found, That as he might have paid the same on Candlemas day, so he might then have made offer thereof; but that in all cases of that kind, the making such offer does not liberate as to the highest prices, unless the party be *in mora* to receive the victual, either at the time of the offer, or six days thereafter. Dirl. 16. June 1675, Gray.

THE Lords found action not competent, against an heir, for damage sustained by the predecessor's relict, thro' the want of her jointure-house all the years of her widowhood, occasioned by the not-performance of her husband's obligation in her contract of marriage, to build and repair the house for her accommodation, unless the heir had been required to build and repair it in her lifetime, because *damnum et interesse* can only be due after *mora*, and there was no *mora*, since there was no requisition; and tho' requisition had been made, damages would have only been due from the date thereof. Forb. 18. Nov. 1712, Nairne.

A TIERCE of brandy being seized, as run goods, before it was delivered to the purchaser, and he being obliged to redeem it, by paying treble excise, and insisting for damage and interest against the seller; the Lords sustained the claim for the true damage, *viz.* the composition

position paid, and not what he might have made more in retailing. Fount. 25. Jan. 1687, Spence and Watson.—A carrier's horse, hired to carry 16 stone, dying by being overloaded, the merchant having put 20 stone upon his back; the Lords sustained process for the price, but not for the profits that might have been made of the horse. Had. 10. July 1610, Straiton.—A cargo of wheat being damaged, by the skipper's fault, yet seeing the victual remained *in specie*, and was not wholly corrupted, but appeared to be useful for ship-bisquet; and seeing the property still remained in the merchant, and the owners of the ship only liable for damages; the Lords ordained the merchant to receive the wet victual, and the owners to pay him what it was worse than the price it would have given at Leith, if the voyage had happened. Stair. 19. Feb. 1670, Leslie.

SIR James Mercer of Adie, having no sons, disposed his estate to his eldest daughter, she marrying a gentleman of the name of Mercer, who should have a reasonable fortune to pay his debts, and to portion his other daughters. The Lady, considering that there was none of that name in Scotland, who had a sufficient fortune for performing these conditions, sent to Ireland, and engaged Colonel Mercer to come to Scotland, and treat for a marriage between his eldest son and the heiress. The terms were accordingly agreed on, and, upon the lady's faith, he brought over his son, with L. 2000 in bills: but she, having changed her mind, would not so much as allow them to see the young lady; whereupon the Colonel, having raised a process for damages, the Lords considered it would be a dangerous precedent to sustain action upon verbal treaties of marriage; yet, it being libelled, That the Lady had given full assurance, and had engaged the pursuer to be at great charges in the prosecution of that marriage, and, notwithstanding, had obstructed the same, tho' all was performed that she had required, they did therefore sustain the action, reserving to modify after probation. Gosh. Stair, 14. Dec. 1675, Mercer.

ONE having disposed to his wife his whole moveable estate, with the burden of his debts, and also having granted her a bond for 3000 marks, to affect the heritage, but with this condition, That in case the debts

DAMAGES and EXPENCES. DAMAGES. 363

due to him should be found to exceed the debts due by him, the bonds should be diminished *in tantum*, and she, after her husband's decease, having intromitted with his writs *per aversionem*, without proper warrant; the Lords found this relevant to infer a presumption, that the debts due to the deceased did exceed the debts due by him, to the value of the sum in the lady's bond, or that the same were so accepted by her. Dalr. 4. Nov. 1714, Campbell.

ONE having obliged himself to deliver a certain quantity of meal, yearly, to a merchant, which he could not perform by reason *Later decisions*, of a general scarcity, was found liable for the current price's of what meal he received from his tenant. Home, p. 393. Dempster, 21. July 1743.—The transgressing a municipal statute, where there is no wrong at common law, will not infer damage, unless specified in the act. Rem. Dec. p. 154. Booksellers in London, 7. June 1748.

DAMAGES and EXPENCES.

I. THE original owner, having arrested a ship that had been taken by the enemy, and sold to the subject of a neutral state, and having been cast in a process brought for recovering the property of her in this country, was found liable in damages and expences. II. *Jus reconventionis*. III. A factor for a stranger, is personally liable in damages and expences, awarded against his employer. Fac. Col. vol. III. p. 263. Seve-
tineballe, &c. 21. June 1763.

D A M A G E S.

DAMAGES were found due to a young woman, who had been seduced by a man. Falc. vol. II. p. 27. Linnen, 19. Dec. 1748.

BY contract between John Whyte and William Macconnoghie, Macconnoghie became bound, for L. 430 Sterling money, to erect and finish a country house for Whyte, conform to a plan agreed on; and it was stipulated,

puted, that the whole work should be well and sufficiently done. Macconnoghie being a wright and undertaker, employed hands of the best reputation, for the mason-work, and the sclater-work; gave them good materials, and desired them not to be sparing of them. He finished the wright-work himself. When the building was finished, it was found that the mason-work and sclater-work was perfectly insufficient, so that the rains came in at all corners; but the wright-work was well done. John Whyte brought an action for voiding the contract altogether, and for repetition of all the sums he had paid to Macconnoghie. Macconnoghie answered, That he had employed the best hands, and given the best materials, which was all an undertaker was liable to do; and with regard to what he had executed himself, he had done it thoroughly well: That he was still willing to build up the walls a-new, and to new-slate the house; both of which he could do without spoiling the wright-work. The Lords, before answer, allowed the defender to perform the operations proposed by him, and any other thing he shall find necessary to make the house sufficient, in terms of the contract, all to be done between and the 1st of August next; but the defender shall not be allowed to haul, or cast any of the walls with lime. Fac. Col. vol. III. p. 17. Whyte, 24. Jan. 1761.

D E A T H.

Morte mandantis cessat mandatum.

A CREDITOR sending with his servant, his debtor's bond to him, with a letter, desiring he would pay the money to the bearer; the Lords found, That if the payment was made, after the debtor knew that the writer of the letter was dead, he could not thereby be liberate, seeing it was to be presumed, That a servant was only to receive the money for his master's use, of whose death, the debtor having knowledge, he was *in mala fide* to have paid. Dur. Spot. (*Exhibition*) 2. Feb. 1628, executors of Lord Duffus.

IN a contract, blank in the sum, to be filled up by

third

third party with what sum he thought fit; the Lords found, That tho' it was not done in his lifetime, yet, if he gave orders for another to do it, that was sufficient, notwithstanding the rule *mortuo mandante cessat mandatum*. Colv. May 1581,

Ramsay.—The rule, That *mortuo mandante cessat mandatum*, was found not to take place in a procuratory *in rem suam*, where the procurator, who, by virtue of his procuratory, was suing debts, had already paid the sums to the constituent. Dur. ult. June 1629, Schaw.

A SASINE was ordained to be given by the superior, upon a procuratory of resignation, after the resigner's death, upon instruments taken against the superior, for refusing before the resigner died.

Procuratories and precepts.

Had. Feb. 1611, Robertson.—It was disputed, between Johnston of Carhead, and Johnston of Newton's creditors, whether the act 1693, making procuratories and precepts perpetual, concerns only these granted by subjects among themselves, or if it comprehends also precepts issued forth of the chancery; the doubt arose from the words of the act, "Considering that procuratories of resignation, and precepts of sasine, become void by the death of the granters," &c. and it was contended, That the word *granters*, is not applicable in stile to precepts issued forth of the chancery. Answered, There is no exception in the act, other than of precepts of *clare constat, et ubi lex non distinguit, notum non est distinguere*; for it says in general, "That in all time coming, precepts of sasine shall be sufficient warrants for taking sasine," &c. The Lords found, That the act 1693, comprehended precepts from the chancery, as well as these granted by subject-superiors. Bruce, MSS. 4. July 1716.—A peer, whose honors were to heirs-male, having signed two procuratories of resignation in favor of his sister, resigning the dignity and honors in the sovereign's hands; but the resignation not being actually accepted during his life, and the sister, after his death, insisting in a declarator against the heir-male, to desist from using the said honors, concluding, That she had right to obtain from the sovereign a patent upon the said procuratories, tho' not

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executed.

executed before her brother's death, if the sovereign pleased to confer the same: Tho' the act 1693, speaks only of the property of lands, &c. yet the Lords found, That the procuratories did not become void by the death of the granter, but that they might still be perfected in favor of the sister and her heirs, if it should please the sovereign to accept of the same, and confer the title on her. Fount. 28. March 1707, Bruce, &c.

CERTIFICATION being granted, but ~~extract~~ superseded till a day, and the defender

If the debtor die pendente processu. deceasing *medio tempore*; the Lords refused to grant certification. Hope, (*Improbation*) 17. Feb. 1629, Mar.—

A decree being stopt, upon a bill given in by the defender, which was ordained to be seen and answered, and the defender having died before the bill and answers were advised, the Lords proceeded to advise them, and finding nothing alledged relevant to make any alteration in the decree, they ordained the same to be extracted without transferring *passive*. Harc. (*Decrets*) Jan. 1686, Burgh.

A WARNING against a father, who thereafter died,

If a master or tenant die after warning. was sustained as a ground for removing the son, who was called in the removing, without necessity of using a new warning against the son. Mait.

25. Feb. 1567, Home. Dur. 27. Jan. 1630, Home.

—An heir, after he is retoured and infest, may sue a removing upon a warning given by his predecessor, tho' his predecessor survived the term. Dur. 28. July 1637, Haddington.—The like; Dur. 27. Nov. 1629, Ramsay.

If a debtor die in cursu diligentia. A HORNING, whereupon denunciation followed, during the rebel's life, may be registred after his decease, and escheat may fall upon it. Dur. 20. Dec. 1626, Ley.

AFTER the death of the judge and clerk, the succeeding

Judicial deeds after the judge's death or removal. clerk may extract any act out of the court-books, which was registred before, and there is no necessity for a transumpt or warrant to add force thereto. Dur. 9. March 1627, Stewart.—An exception, of lawful pointing,

ing, was sustained to elide an action of spulzie, altho' the sheriff, who directed the precept of poinding, was now two years out of office, and another in his place; in which case the Lords found no necessity to put the lieges to the charges of a new precept. Dur. Spotif. (*Sheriff*) 22. Jan. 1629, Masterton.—A nullity, objected to a poinding, was repelled, *sciz.* That the bill and protest were registred, when the bailie principal of the bailiary was dead, and the commission to the bailie depute, or substitute, had fallen by the death of the bailie principal. 18. Feb. 1732, Hunter.

AN order of redemption, used against the father, was found sufficient after his death, as a foundation of a declarator of redemption against the apparent heir, without necessity of a new order. Dur. 11. Dec. 1638, Finlayson.

Order of redemption.

APPRIISING and arrestment, fall not by the common debtor's death. See Adjudication. See Arrestment.

CONFIRMATION may be after the disponer's death. See Confirmation.

D E A T H - B E D.

THE law of death-bed, protects every sort of heir, male or of tailzie, as well as heir of line; those who are heirs in personal rights, as well as those who succeed to infestments. Stair, 25. Feb. 1663, Hepburn.—Death-bed takes place in favor of all sorts of heirs, whether the destination be by infestment, or only in a personal deed. Home, 26. Jan. 1726, Glydsdale. Stair, 4. July 1672, Porterfield.

Competent to all sort of heirs.

ONE having become bound, in his contract of marriage, to provide a certain sum, and also the conquest, during the marriage, to himself and spouse, in conjuncture, and to the children, to be procreated of the marriage in fee, did purchase an estate during the marriage, taking the rights thereof to himself, his heirs and assignees, and, upon death.

If competent to heirs of provision?

death-bed, did execute a deed, settling both heritable and moveable estate upon his eldest son, with the burden of certain provisions, in favor of the younger children; in a reduction of this settlement, at the instance of the younger children, upon the head of death-bed, the Lords were unanimous, That, seeing there was no actual settlement of the conquest, in terms of the foresaid obligation, to constitute the children heirs of provision, they had not the privilege of death-bed; that they were constituted creditors by that obligation, and in whatever way, a service in general, as heir of provision or conquest, may have crept into our practice, it is, strictly speaking, inept; such a thing, while the father is alive, cannot be, and if he dies without implementing, the obligation is purified in favor of the children, and they have a direct action against their father's representatives, to make over the conquest in their favor. 16. Dec. 1738, Campbells.—In a similar case, where one was bound in his contract of marriage, to provide the conquest to himself and children of the marriage, and where he having granted a rational provision to his second wife, and the same being objected to, by the children of the first marriage, not as inconsistent with the clause of conquest, because, by such a clause, a father is not bound up from doing rational deeds, but, upon this footing, That it was upon death-bed, and reducible by them, as heirs of provision; the Lords sustained the provision so far, as the dead's part did extend, seeing it could not prejudge the children's legitim. Stair, 16. Dir. 20. June 1676, Mitchel.—Upon the same footing, where one is bound in his contract of marriage, to provide a definite sum to the children of the marriage, he may exercise his implied power of division upon death-bed. Forb. 19. July 1706, Edmondston.—One who was bound in his contract of marriage, to provide the conquest to the heirs of the marriage, having granted a legacy upon death-bed, of 500 merks to a stranger; the Lords found, That the clause of conquest, in the contract of marriage, did hinder the father to dispose of his moveable estate upon death-bed; but, as this was a deed, neither onerous nor rational, the clause of conquest would have struck against it, tho' the testament had been executed in

in *liege poustie*; and therefore, is not contrary to the above decision, finding, That the father may do rational deeds upon death-bed. Home, Feb. 1722, Maxwell.

THE Lords found, That a disposition made *in lecto*, may be reduced, not only at the instance of the apparent heir, living at the time, but he dying, at the instance of the heir who succeeds him. Stair, 21. Jan. 1668, Schaw. Gosf. Stair, 16. July 1672, Gray.—One *Competent to the remoter heir, after the immediate apparent heir's decease.*

upon death-bed, having disposed his estate to his infant son, and the heirs of his body; whom failing, to certain extraneous substitutes, and the son, his only child, having died without issue, in a reduction, at the instance of the next heir, it was objected, That the privilege of death-bed, is not competent to a remoter apparent heir, where the apparent heir for the time, is not lesed. The Lords repelled the objection, and sustained the action at the instance of the remoter heir. Home. 13. July 1722, Kennedy.—A disposition being granted on death-bed, to certain trustees, “for the behoof of the disposer’s only daughter, her heirs and assignees, in case she live to be married, or attain to the age of 21 years, which of them shall first happen, but in case of her decease, before that time, for behoof of the poor of the maltmen-calling in Glasgow;” and the daughter having died, before her majority or marriage, in a reduction, at the instance of the next heir, the Lords found the disposition was not only in prejudice of the remoter heir, but also in prejudice of the nearest heir at the time, she being an infant, and the estate being, upon her failure, even in infancy, provided to strangers, and therefore reducible, *ex capite lecti*. 13. Feb. 1739, Craig.

A MAN, upon death-bed, cannot gift away his lying money, further than his own half, or third thereof. Dur. 15. March 1634, Brown.—An assignation to moveables, on death-bed, was found valid, where the cedent had neither wife nor children to quarrel the same, as done to their prejudice. Falc. 15. March 1683, Sandilands.—The wife and children cannot be prejudged by any deed on death

Competent also to the wife and children.

death-bed, more than the heir. Stair, 16. June 1676, Mitchel. Fount. 29. Jan. 1679, Aikman.—This found, with respect to the wife's third of moveables. Dur. 10. July 1628, Cant.—Sums lent out upon heritable security, by a person in *lecto agritudinis*, do not prejudice his relict and children. Harc. (Executry) March 1683, Henderfön.

A REDUCTION, upon the head of death-bed, is competent to the deceased's personal creditors, for he can no more prejudice them by any deed done on death-bed, than he can prejudice his apparent heir. Stair, 25. Nov. 1669, Creditors of Couper.—The contrary found, in respect that death-bed is a privilege competent to the heir only, or those in his right. Dalr. 24. June 1714, Creditors of Lindsay competing.

AN heritable bond, upon which infestment had not past, being alienated upon death-bed, did extend to this case, where there was no infestment: seeing our ancient law-books talk only of *terra et tenementa*. The plurality found, that this case fell under the law of death-bed. Colv. 16. Jan. 1581, Dickson.

AN assignation being quarrelled, as done on death-bed, the exception was not received, being proponed by the debtor, altho' the bond assigned was heritable; and he alledged, He was not in *tuto*, to pay to any except the heir, seeing the Lords ordained the assignee to find caution, to warrant the debtor at the heir's hands. Dur. 12. July 1626, Wallace.

—Found it not competent for debtors to object to an assignation granted upon death-bed, by a deceased to his wife, of certain sums, both heritable and moveable, as being in prejudice of the heir and executor, when they themselves did not quarrel the same. Dur. 16. Feb. 1628, Robertfön.

THE law of death-bed strikes at moveable as well as heritable bonds, since for these also, the heritage may be comprised, and so the heir prejudged. Dur. 7. Jan. 1624, Shaw.—Bonds, granted on death-

If competent to the deceased's creditors?

Death-bed deed effectual, and gives a jus exigendi, unless challenged by the heir.

Against what deeds it strikes,

death-bed, altho' they do affect only the dead's part, yet they are preferable to legacies left in the ordinary way, for the deceased is in *legitima potestate*, as to the affecting his part, and granting of bonds to that effect, Stair, Dirl. 14. Dec. 1676, Mitchel.—The Lords refused to sustain a deed on death-bed, disposing moveables, *in quantum*, prejudicial to the heir's relief of moveable debts. Falc. 27. Feb. 1683, Leven.—Bond, secluding executors, cannot be disposed of upon death-bed. Home, 12. Jan. 1725, Mackay. Harc. (*Letis agitudinis*) 20. July 1688, Pringle.—A tack, cannot be disposed on death-bed, in prejudice of the heir. Hope, (*Heir*) 10. March 1621, Dunlop.

A WOMAN, upon death-bed, granted a disposition to one of her sisters, excluding another who had a right to come in as heir-portioner; the Lords repelled the allegation, That the alienation was *intra familiam*, and found the reduction, on the head of death-bed, relevant. 26. Jan. 1727, Adams. *Where the disposition is intra familiam?*

FOUND, That a father, on death-bed, cannot make any provision in favor of his children, altho' unprovided, which might burden the heir with payment thereof, and that the maxim was universal for all, as well children as strangers. Dur. 1. July 1637, Cranston-Riddel. Home, July 1721, Foulis. *Bonds of provision to children.*

HUSBANDS, *in lecto*, are not hindered to give liferents to their wives, otherways unprovided. Stair, 23. Feb. 1665, Jack. *Liferent in favor of a wife or husband.*—But they cannot go above the value of the legal terce. Stair, Dirl. 12 Jan. 1668, Schaw.—A father, upon death-bed, disposed his estate to his daughter, who was his only child, and her husband in conjunct-fee and liferent, &c. This disposition being quarrelled, by a remoter heir, after the daughter's death, as to the husband's interest therein; it was argued for the husband, That the disposition, tho' upon death-bed, must be sustained for his liferent, upon this consideration, That had it not been for the death-bed deed, he would not have failed to invest

feft his wife as heir to the deceased, whereupon his liferent would have arisen to him by the courtesy of Scotland; and therefore, since the husband craved nothing by the death-bed deed, but what he would have had, tho' it had never been granted, the liferent ought to be sustained, since the heir suffers nothing thereby, and, in so far as the liferent reaches, was not lesed by the death-bed deed; which was sustained. Gosf. 16. Stair, 25. July 1672, Gray.

FOUND, That conform to the *leges burgorum*, a burghess may alienate lands on death-

Deeds in favor of creditors.

bed, for payment of his debts, contracted prior thereto; but that, in this case, the heir must be first required to pay the said debts, and to maintain the clinique *in litem*. Mait. 26. March 1568, Anderson.—A moveable bond was sustained to an apothecary, for the prices of drugs furnished. Dur. 7. Jan. 1624, Schaw. The like; Fount. 27. July 1678, Heriot.—A bond, for goods furnished, was sustained, tho' granted on death-bed. Dur. 13. July 1632, Pollocks.—But in the same cause, the Lords repelled another alledgeance, That another bond, by the same clinique, was for furnishing made to his father; for which they refused to sustain the bond, unless it was alledged, That the deceased was heir or executor to his father, whereby law would have obliged him to pay the sums. Dur. *ibid.*—A disposition, being quarrelled as upon death-bed, the disponent alledged onerous causes, and condescended, That he was creditor to the deceased by a clause of warrandice; the Lords sustained the disposition, as a security of the clause of warrandice; but, that the lands, disposed upon death-bed, might not be perpetually burdened with that relief, they restricted the same to distresses, occurring within seven years. Stair Gosf. 1. Feb. 1676, Lawrie.—An heritable bond being granted on death-bed, in corroboration of a prior bond for the same sum, which prior one carried no obligation to grant a further security; the Lords, in a competition between an adjudger and this infester, considered, That, tho' such a bond would not subsist against an inhibitor, unless there had been a previous special obligation to grant it; yet, that such privilege was not competent to the heir, or to his creditor, and therefore preferred

preferred

preferred the annual renter. Forb. 18. Fount. 19 Jan. 1709, Hay.—A party who, by contract of marriage, was bound to provide the children thereof in a certain sum, having granted a bond of provision, on death-bed, to one of them, for a sum something less than the due proportion, but making no mention therein of the said contract of marriage; the Lords here repelled the defence of death-bed, and sustained the bond of provision. Forb. 19. Fount. 20. July 1709, Edmonston.

A SALE of lands, tho' for a reasonable price, reduced *ex capite lesli*. Dur. *Sale of lands, penult.* July 1635, Richardson.

A TACK, for three 19 years, of the granter's whole estate, done upon death-bed, tho' alledged to be for an adequate rent, was reduced; it being pled, That tho' a tack, *Tack granted on death-bed.* for a moderate endurance, granted upon death-bed, may subsist, as being an act of ordinary administration, a tack, for three nineteen years, is a species of alienation, which cannot be granted upon death-bed. Dec. 1733, Chrystifons.

THE law of death-bed protects the heir, not only against alienations, but was found effectual against the superior, insisting in a declarator of recognition, upon an alienation made upon death-bed. Stair, 20, July 1669, Barclay. *Death-bed deed, if it will infer recognition against the heir.*

A TUTOR named in a testament, with this quality, That he should only be liable for actual intromission, was not found to have the benefit of this quality from the act *Nomination of tutors.* 1696, unless the testament was made in *liege poustie*. Forb. MSS. 28. Jan. 1714, Watson.

A MAN disposing his estate to his heir, with a reserved faculty to burden it with a certain sum; the burden was sustained against the heir, tho' the faculty was exercised upon death-bed. Stair, 28. June 1662, Hay.—In a destination of succession, in favor of heirs-male, there was a clause bearing, "That it should be leisom to the said Thomas at any time, during his life, to alter the same." This was found not to validate an alteration upon *Reserved faculties, if exercisable upon death-bed?*

upon death-bed, tho' in favor of the heir of line. Stair, 25. Feb. 1663, Hepburn.—A father disponed his estate to his eldest son, reserving power *at any time, during his life*, to burden it with a certain sum; this power he exercised upon death-bed, which was found good against the disponsee, who was heir, seeing he had accepted and bruiked by the disposition, reserving this power to burden, *at any time during his life*, which includes also death-bed. Stair, Gosf. 22. June 1670, Douglass. The like. Gosf. 16. Dec. 1668, Bryson.—A man in *liege poussie*, having subscribed a disposition in favor of one not *alioque successurus*, and intrusted the same to a third party, to be re-delivered to him upon demand, and, in case of his death, to be given up to the disponsee; he recalled the said disposition on death-bed, and in place thereof, made out two dispositions, the one in favor of his heir of line, of the one half of the subject, the other in favor of another relation of the other half. The Lords sustained all this, tho' done upon death-bed, because the first disposition, not being a delivered evident, was absolutely in his power; and since he recalled it *ad hunc effectum*, to give his heir of line the one half of the subject, the heir, who was benefited thereby, could not quarrel the same. Stair, Gosf. 25. Jan. 1677, Ker.—A person having tailzied his estate to a stranger, with this provision, That the disponsee should be bound to pay all his debts contracted, or to be contracted, and that should be due at his decease, but without the clause, *Etiam in articulo mortis*; and having thereafter granted a bond upon death-bed, the Lords found, That the disponsee was burdened with the said quality in the disposition; and therefore, that he could not reduce the bond as granted on death-bed. Home, 2. Dec. 1685, Brown.—A person having disponed his estate to the second son of a family, being a stranger, with a power to alter, and with the burden of all debts and obligations he should adject at any time in his life, and having ordained him on death-bed, by a writing under his hand, to marry a certain gentlewoman, otherways to lose the estate, and neglecting to provide it to another, in this event, (whereby it would become caduciary, and belong to the king) and he being required to marry, by way of instrument, and refusing, whereupon a declarator of his anjitting the estate

was raised; tho' this reserved faculty virtually contained a disposal of heritage on death-bed, and also was *contra libertatem matrimonii*; yet the Lords found, That the disponent might, *etiam in lecto*, burden his disposition with what qualities and conditions he pleased. Fount. 3. Feb. 1687, and 25. Jan. 1688, Hepburn.—Davidson having acquired some lands to himself in liferent, and his eldest son in fee, reserving to himself power to alter and innovate at any time in his life, *etiam in articulo mortis*; and having, by virtue of the reserved faculty, made a new disposition in favor of his second son; the eldest raised reduction thereof *ex capite lecti*.—Alledged for the defender, This privilege is only competent to an heir, and the pursuer cannot insist in quality of heir. 1^{mo}, Because, the father was never heir of the lands. 2^{do}, Because the pursuer's disposition and infeftment, gave him a right to the lands *qua* disponent, but must forever exclude him from making up a title in quality of heir. To the first answered, The father was in effect heir by the reserved faculty. To the second, The pursuer's infeftment, taken in his name, when a child, cannot debar him from pleading in his natural quality of heir. The Lords reduced the second disposition. Fount. Harc. (*Lectus aggritudinis*) 24. Nov. 1687, Davidson.—But thereafter the interlocutor was stopped, and an act, before answer, pronounced, for trying if the second disposition was made in *liege possitie*, or in *lecto*; and if the disponent was *sane mentis* at the granting thereof. Upon which the matter was settled by a transaction. Fount. 3. Dec. 1687, Harc. (*Lectus aggritudinis*) Feb. 1688, *inter eosd.*—A father having disposed his estate to his son, with the burden of all provisions to his younger children, granted, or to be granted; and thereafter, upon death-bed, having granted a bond of provision to one of his daughters, the Lords found this bond not reducible *ex capite lecti*, by the heir, who had accepted the foresaid disposition, and behaved to be liable to the burdens and qualities thereof. Fount. Forb. 8. Feb. 1706, Bertram.—A party having made a tailzie in favor of some others, failing heirs of his own body, but bearing this reserved faculty, "That it should be lawful to him, at any time during his life time, to alter the said tailzie;" which, *de facto*, he so far did, as to

make a new tailzie, only this last being done on death-bed; the Lords found, That the granter might, on death-bed, recal and annul the first tailzie, tho' this faculty bore no more but the words, *At any time in his life*, and wanted the clause, *Etiam in articulo mortis*; judging, that these words at any time during his life, were opposed to death, not to sickness. Fount. 25. Feb. Fount. and Dal. 31. Dec. 1707. Forb. 23. Jan. 1708, Livingston.

A DISPOSITION, executed in *liege poullie*, but blank as to the disponee's name, was found reducible, as upon death-bed, seeing the disponee's name was filled up upon death-bed. Fount. 18. Jan. 1687, Pen-
vicnik, The like. Stair, 22. June 1678, Birnie.

A MAN, being *oberratus*, and thereby forced to sell part of his lands, yet fearing men should scruple to transact with him, because
What circumstances infer he was kept bedfast with the gout, *death-bed.* made supplication to the Lords to direct some of their number to visit him,

and try his condition; which being done, and they reporting, That, altho' he could not use his limbs, yet that it was a lingering infirmity, and his memory and judgment intire; the Lords declared, That the alienation, to be made by him, should not be reducible *ex capite lecti*. Had. 3. Dec. 1608, Gilbert supplicant.— Found, That a husband, twelve or thirteen days before his decease, being sick of a fever and flux, and not coming to kirk and market thereafter, could not infect his wife in a liferent. Dur. 1. Feb. 1622, Robertson.—A moveable bond, granted seven weeks before the party's decease, but she being sick at the time, tho' not of a *morbis fortis*, and not coming thereafter to kirk and market, was reduced *ex capite lecti*. Dur. 7. Jan. 1624, Schaw.—A sale of lands, made by a person paralytic, a year before his death, and while he was found in judgment and understanding, and in the constant exercise of managing all his affairs, was yet found reducible *ex capite lecti*, unless he had come abroad after it. Dur. *penult.* July 1635, Richardson, &c.—In a reduction upon death-bed, it was offered to be proved by the defender, That tho' the deceased was confined to the house, having broke his leg, so that he could not

go to kirk or market, that he was, notwithstanding, in perfect health when he granted the bond; which was repelled. Stair, 25. Feb. 1668, Dun.—A running sore was found to be a disease, whereof one may die as well as of sickness; and therefore sufficient to subject a person in that situation to the law of death-bed. Fount. 20. Feb. 1694, Scotstoun.—A party, having by a rheumatism, contracted a lump on his back, which dislocated two of his *vertebrae*, so that he kept his bed, and could not walk so much as on crutches; and having granted bonds in that condition, the last of which was, nevertheless, more than three years before his death; the Lords thought it hard to fix a death-bed so far back, and that it ought not to exceed a year, and the party having died of a fever, that the immediate, not the remote cause of his death, was here to be considered; and therefore, they found death-bed not proved in this case, and assolizied from the reduction of the bonds. Fount. 11. June 1696, Gordon.

A DISPOSITION was found to be *in loco*, because, tho' the party went to kirk and market, yet he was supported. Auch. *Reconvales-*
(Disposition) 7. July 1629, Maxwell. *cence by going*
—A deceased having gone several times to kirk or market, and walked there unsupported, and other times abroad, after the disposition challenged, sometimes a-foot, and sometimes on horseback, this was found relevant to exclude the reasons of reduction on death-bed, notwithstanding of his being helped up and down stairs, and to and from his horse, and by leading his bridle, and that notwithstanding, he continued sickly till his death. Stair, 26. Feb. 1669, Pargillies.—It is not necessary to prove, that the deceased went both to kirk and market unsupported, either is sufficient. Stair, 28. June 1671, Creditors of Balmerino.—Going free to the market, must include going free to the market-place, and returning back from the same not being supported any part of the way. Stair, *Gosfi Ibid*.—In a reduction upon the head of death-bed, several witnesses deponed, That the deceased went vigorously to his coach, in which he was carried to church, and all the way unsupported; one witness deponed, That in going down stairs, the deceased leaned his hand upon a
Li 3 man's

man's shoulder; another deponed, That he staggered as he went through the close, and was supported by the deponent. The Lords found the deed was done on death-bed, and that the positive probation of supported, tho' by single witnesses, was more pregnant than the negative of unsupported; and they thought the exercising acts of health and strength for validating rights, by the help of coaches or sedans, are suspicious circumstances, which the party would have avoided had he been able. Harc. (*Lectus agritudinis*) Jan. 1685, Lufs.

—Two witnesses deponing, That the person alledged sick, was supported when he went to kirk or market, was found to make a full probation, altho' many witnesses deponed *negative*, that they did not see him supported; and found, that domestic deeds were not to be regarded for proving convalescence. Stair, 5. Gosh. 12. Dec. 1672, Cleland. Stair, 9. Jan. 1673, Nicol.

IN a proof of death-bed, it was found, That the deceased's private way of going abroad, tho' unsupported, was not equivalent to his going to Kirk and market. Stair, 7. Feb. 1671, Laurie.—In a question of death-bed, it being proved, That the deceased himself constantly put on his own clothes, walked up and down his house, conveyed strangers to their chambers, freely without help or support, and in the same manner went down with others to see them take horse, made several accompts and bargains, and frequently play'd at cards: All this was not found relevant to infer health, or equivalent to the going to kirk and market. Stair, Gosh. 28. June 1671, Creditors of Balmerino. In a reduction *ex capite lcti*, it being proved, That at the date of the disposition, the granter had a gout and palsy, of which he never recovered, but that he walked unsupported about his doors after the date of the deed, and managed his business discreetly, and that, at two different times, he rode several miles from his own house, and made bargains; yet all this was not found equivalent to his going to kirk and market, it being pled, That equipollent acts are not to be sustained, unless having the essential qualities of being, at kirk and market, *viz.* performed before many indif-

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ferent witnesses. HARC. (*Lectus agritudinis*) Feb. 1683, younger daughters of Mountainhall.—In the reduction of a disposition, of some heritable sums, made by a quaker *ex capite lecti*, the Lords sustained the following qualifications sufficient to elide the reasons of death-bed, That the disponent had, several weeks after the disposition, sit in his shop, and sold his goods, and that he had walked before his shop door, and purchased a suit of clothes in the next shop, seeing, he being a quaker, was not obliged to go to church to ratify his deed. HARC. (*Lectus agritudinis*) Feb. 1683, Livingston.—In a reduction *ex capite lecti*, the Lords refused to sustain the following acts as equipollent to the party's going to kirk and market, *viz.* That he, after the disposition, came down a very rugged way near Stirling, without help, and there took coach, and travelled four miles to Alloa, where he died. FOUNT. HARC. (*Lectus agritudinis*) 25. Nov. 1687; Keirie.—The following acts to prove reconvalescence sustained equivalent to going to kirk and market, *viz.* going from Edinburgh to Inverkeithing to assist at the election of a commissioner to the parliament, spending the whole day in a boat at sea, in the way of diversion, walking in the Lady Home's yards, and visiting prisoners in the tolbooth. FOUNT. 21. Feb. 1694; Tillitoven.

IN a reduction upon the head of death-bed, it having come out in the proof, That the deceased, after granting the disposition quarrelled, had come in to Edinburgh from his country-seat, some few miles distant, went to the cross publicly, between twelve and one, and walked there half an hour unsupported, conversing with people of business, and others: It was objected, That the cross of Edinburgh is no market place. The Lords found, That the deceased was at the market-cross of Edinburgh, in market time of day, and walked there a considerable time, unsupported, and therefore repelled the reason of reduction. 29. July 1736; Roseberry.

IN a reduction upon death-bed, it is not necessary to condescend upon a particular disease. Stair, Gosh. 28. June 1671, Creditors of Balmerino.

Going to the cross of Edinburgh.

The particular disease need not be libelled.

A. MAN.

A MAN having been many months ill of a *Typhus*, and, while under the disease, having signed a disposition, after which he did not live 60 days, but died of the same disease, yet went unsupported to kirk and market, after granting the writ; the Lords finding the going to kirk and market clearly proved, sustained the disposition, and assolvied from the reduction, *ex capite lēti*. Fount. 5. Dec. 1711; Crawford.

A MAN, upon death-bed, disposed his estate to his daughter (apparent heir) and her husband, in conjunct-fee; whom failing, to her husband's heir; the daughter and her husband possessed the subject

several years, and never reclaimed, or raised any process against this death-bed deed; yet this possession of the apparent heir, being under the influence of her husband, was not found an homologation, to debar a posterior apparent heir from quarrelling the same. Stair, 16. July 1672, Gray.—A man having made a disposition on death-bed, in favor of his heir; and failing of him, to strangers, after the heir's death, the same was quarrelled by the next apparent heir, who contended, That the law of death-bed was introduced, for securing not only the immediate apparent heir, but the whole heirs indefinitely. Answered, The consent of the immediate apparent heir, has ever been held sufficient to bar any other heir from quarrelling; and here the deed being in favor of the immediate apparent heir, must be held equivalent to his consent. The Lords considered, if the son, who was institute, had been of age, accepted and entered to possession, there might have been some doubt how far the remoter heir could be permitted to challenge; but the institute here, being an infant, and who out-lived his father but a short time, they sustained the remoter heir's interest and title to sue this reduction. Fount. 25. Dec. 1696, Power.—An heir-portioner, in her contract of marriage, having accepted a provision, in lieu of all she could ask or crave, thro' her father's decease, as this did not bar her from succeeding as heir *ab intestato*, so the father, having disposed an heritable subject upon death-bed, it was not found to bar her from quarrelling

quarrelling the same, tho' it was pled to be equivalent to a consent to the death-bed deed; for the difference is great, between empowering one antecedently to do a deed, which the law condemns as wrong, and acquiescing in it, after it is done. 13. Nov. 1728, Reids.— A person in *lige poustie*, took an obligation in writing, from his presumptive heir, "not to quarrel or impugn, on the head of death-bed, any deed or settlement which he should make, but, on the contrary, to ratify and approve the same;" In a reduction, *ex capite liti*, at the instance of this presumptive heir, of a death-bed deed, granted by the predecessor to his prejudice, the said obligation was objected to him, by way of defence, and the maxim urged, *unicuique licet favori pro se introducto renunciare*. It was answered, 1mo, The law of death-bed was introduced for a protection to dying persons, to guard them from the artifices of cunning men; for, if the heir's interest was only concerned, this consideration would extend to alienations in *lige poustie*, as well as upon death-bed. 2do, The heir is not at liberty to refuse his consent in such a case; and, if *metus carceris*, be a good ground for avoiding an obligation, *metus exheredationis*, is much stronger. The Lords repelled the defence, and found this antecedent consent not sufficient to bar the heir from quarrelling the death-bed deed. 4. Dec. 1733, Inglis.

RATIFICATION upon oath, of deeds on death-bed, made by the granter, hinders not the heir to quarrel the same. Falc. 27. Feb. 1683, Leven.

Granter's ratification upon oath.

REDUCTION upon the head of death-bed, takes only place in time coming, and not quoad bygone fruits and annualrents intromitted with by the disponent. Fount. 11. Dec. 1677, Lockhart.

Effect of this reduction,

AN obligation, granted by a man under sentence of death, was found no better than one granted on death-bed. Had. Cant.—The like; Marc. (Summons) March 1685, Graham.

One under sentence of death.

A PERSON, leaving his moveables to his heir, and by

Later decisions. by the same deed, disposing of an heritable subject, within the value of the moveables, the heir cannot quarrel the disposition as on death-bed. *Falc.* vol. I. p. 123. *Rem. Dec.* p. 114. *Paterfon*, 19. July 1745.

A PERSON, having disposed his whole estate for uses, part of which he afterwards revoked; and having, by a subsequent deed, disposed it for such of the uses as he inclined should stand, and the remainder to certain persons, it was found, That the heir was not excluded by the first disposition, from reducing the second on death-bed, in as far as it disposed the subject over what was destined for the subsisting uses. *Falc.* vol. II. p. 40. *Campbell*, 17. Jan. 1749.

A RATIFICATION is not a deed that can be reduced, as upon death-bed. *Rem. Dec.* p. 84. *Leslie*, 2. Nov. 1744.

ONE cannot, on death-bed, exercise a faculty of burdening his estate with a sum of money for provision to his children, altho' the faculty be contained in a deed executed in *liege poustie*. *Fac. Col.* vol. I. p. 201. *Forbes*, &c. 12. Feb. 1755. This was reversed on appeal.

IN the 1737, John Primrose disposed his lands of Burnbrae to the pursuer, his heir at law: but, in the 1752, when between 70 and 80 years of age, and confined to his bed, he destroyed that disposition, and disposed the lands to the defender, the son of his natural brother. John Primrose neither went to kirk nor market after executing the last disposition, and died within 47 days of its date. The pursuer obtained himself served heir in general to John Primrose, and brought a reduction of the disposition 1752, upon the head of death-bed.—The defender contended, That the deceased was not on death-bed when he executed the deed, but was only confined to his bed by old age, and a weakness in his feet: That he died of an apoplexy, with which he was seized eight days before his death. The Lords allowed a proof to both parties, of the condition of the health and capacity of the deceased, at the time of his granting the disposition quarrelled, and for some time before, and afterwards, to the time of his death. At advising of the proof, the pursuer pleaded from the evidence, That the deceased had been seized with the gout in his hands and

and feet, about 14 years before his death; and that the fits of that distemper generally recurred upon him twice a-year: That he had been seized with an iliac passion about a year and a half before his death: That this distemper was removed by proper medicines; but that his constitution had been thereby impaired: That watery swellings appeared in different parts of his body; and that he had remained bed-ridden for several months before his death: That the surgeon, who had formerly attended him, and who had occasion to see him about a week before his death, deposes, That, in his opinion, the iliac passion threw him into a lingering distemper, whereof he at last died. That other persons who saw the deceased, both before and after the date of the deed quarrelled, depose, That he appeared to be in trouble, and to be an infirm and dying man: That, a few days before his death, he was seized with a trembling fit, and from that time became sensibly weaker and weaker, till he died; but that this fit must not be considered as a new distemper, but as the crisis of the distempers, under which he had long laboured.—The defender answered, That, at the time of executing the deed, John Primrose did not appear to have contracted the disease whereof he died, nor indeed to have been affected with any disease at all. He was confined to his bed by old age and a weakness in his feet, occasioned by former fits of the gout. He was seized with a trembling fit a very few days before his death, and more than a month after he had executed the disposition quarrelled: from that fit is the disease whereof he died to be dated; the iliac passion being an acute distemper, could not be the cause of his death after an interval of a year and a half; neither could the gout be the cause of his death; for that it was fixed in the extremities of his body, and a gout of that nature is not held to be a disease rendering one incapable of disposing of heritage. Besides, the deceased was not actually affected with the gout when he executed the disposition quarrelled, but had only contracted a lameness from former attacks of that distemper. The sudden illness whereof he died, can no more be connected with the gout and iliac passion, than an ague in one year, and a flux in the next, can be connected with a fever, whereof one dies in the third year.

The

The Lords found the reason of reduction relevant and proven, and reduced the deed. Fac. Col. vol. I. p. 271. Primrose, 28. Jan. 1756.

A FATHER cannot, on death-bed, grant bonds of provision to younger children, to affect the heir. Fac. Col. vol. II. p. 88. Younger children of Campbell, 15. Nov. 1757.—But he may grant a rational provision to his widow. Fac. Col. vol. II. p. 264. Logan, &c. 18. Dec. 1758.

A RESERVED faculty of burdening an estate, contained in a disposition by a father to a son, which was accepted by the son, was found capable of being exercised gratuitously, and on death-bed. Fac. Col. vol. II. p. 247. Buchanan, Aug. 1758.

A TACK, granted on death-bed, was reduced. Fac. Col. vol. II. p. 334. Bogle, 19. June 1759.

NO recourse upon a death-bed deed against the dead's part. See *Quod potuit non fecit*.

THE heir's personal creditors, if entitled to insist in a reduction upon the head of death-bed. See *Personal and transmissible*.

DEEDS on death-bed, how far probative? See *Proof*.

DEBTOR and CREDITOR.

Relief among co-debtors, and if the creditor, upon payment, is bound to assign, in order to operate relief? CO-DEBTORS, bound conjunctly and severally, whether as co-principals or co-cautioners, if any one pay the debt, he is entitled to relief off the rest, *quia de jure inest*. Stair, 19. June 1662, Wallace. Stair, 28. June 1665, Montieth. Dir. 12. Dec. 1665, Ferguson. Stair, Dir. 27. Jan. 1675, Monteith. Gosf. 5. July 1677, McMillan.

A CAUTIONER, upon payment, craving assignation against his co-cautioner, the Lords found the creditor not obliged to assign, the cautioner being sufficiently secured in law by his action for relief. Newb. Stair, 10. July 1666, Home. Fount. ult. Dec. 1697, Rae.—Tho' some creditors, when getting payment from cautioners, are so scrupulous, that they will not grant an assignation, and to which they cannot be forced by law ;

yet

yet a discharge to a cautioner, operates the same effect, *quoad* his relief, that an assignation would do, except as to a summary charge, and present execution. Fount.

12. Dec. 1695, Wood.—A cautioner in a suspension, being distressed on a decree, may demand assignation, not only against the principal, for whom he was cautioner, but against the whole cautioners in the original bond.

Gosf. 7. Nov. 1676, Riggs.—A personal creditor, adjudging, tho' he be bound to accept of payment from another personal creditor, yet cannot be forced to grant an assignation, but a discharge only: But here the Lords declared, That they would take into consideration, how far the refusal should cut off the accumulations. Fount.

14. Feb. 1702, Hay.

A BOND, granted by a principal, and two cautioners, being assigned only in so far as might be extended against the principal debtor and one of the cautioners; action of relief of the half thereof, was found competent to the distressed cautioner against his co-cautioner, notwithstanding the restriction of the assignation, which screened him only from the direct action at the assignee's instance, but could not evacuate the implied obligation of relief among cautioners. Forb. 12. Fount.

27. Feb. 1712, Scot.

ALTHO' an annualrenter may distress any part of a tenement affected, for the whole annualrent, yet the Lords found, That the heritor of that part might demand his relief off the rest of the lands affected, and off the heritor thereof, *pro rata*; and this, both for by-gones already paid, and for all years to come. Dur.

26. June 1635, Grieve. Stair, 22. June 1671, Balmerino.—An annualrent being payable out of two tenements, which came afterwards into the hands of two different singular successors, it was found, That the annualrenter might uplift the whole, out of any one of the tenements, assigning against the other for relief. Stair, 26. June 1662, Adamson.—The like; Fount. 25. Nov. 1708, *inter cosd*.

A MAGISTRATE, upon his negligence, in suffering a debtor to escape out of prison, being condemned to pay the debt, has no recourse against the cautioners, whether he obtain from the creditor a discharge only, or be assigned to the debt, because he is liable *ex delicto*, and comes in place of the principal debtor. Stair, Dir.

24. Jan. 1668, Magistrates of .—The like found, with regard to a granter of a bond of presentation, who having paid the debt, upon failing to present the person of the debtor, and taken an assignation, was not found entitled to relief against the cautioners in the original bond. Feb. 1731, Graham.—Yet two persons being found liable *in solidum* to pay a fine, the Lords decerned the creditor, upon payment by one, to assign against the other, for the one half, because otherways, the law does not furnish relief, between *cavei* who are liable *ex delicto*. Fount. 15. July 1680, Anderson.

TWO parties granting a bond, and thereafter one of them granting a bond of corroboration, mentioning the former, as granted by them two, but no mention which was principal, or cautioner, and the heir of the debtor of the bond of corroboration, being sued thereon, the original bond, to which it related, being a-missing; the Lords, in respect of the creditor's negligence, in losing the first bond, whereby the defender was cut out of his recourse against the heirs of the other obligant, assolzie the defender from the one half of the debt, and declared, if he would burden himself with the proof that he was only cautioner, they would assolzie him from the whole. Forb. 23. Fount. 24. July 1708, Creditors of Nicolson.

A PARTY having granted an heritable security of his estate to his brother, for his relief of what debts he was then owing him, and of all others he should be resting him thereafter; the Lords found, That other creditors, having thereafter adjudged, the brother could not, posterior to the adjudications, acquire any debts due by the common debtor, to the prejudice of the adjudgers. Bruce MSS. 25. July 1716, Menzies.

A LIFERENTRIX, by annuity being infest in two separate subjects, one of which was also affected by second infestment; the Lords declared they would ordain the liferentrix, either to assign her right upon payment, or to do diligence, first against that subject.

A preferable creditor can do no arbitrary deed, to prefer one secondary creditor to another.

Therefore, if he take his payment out of one subject, he is bound to assign to the postponed creditor in order to operate relief.

ject in which the secondary creditor had no interest. Fount. 1. Feb. 1693, Gunsgreen.—In a competition, an adjudger, subjected to an inhibition, offering to purge, by payment of the debt, the creditor was found obliged to assign his inhibition, but not in so far as it might be prejudicial to other debts in his person. Stair, 19. July 1672, Chiesly.—The like; Stair, Gosf. 11. Feb. 1676, Bruce.—A creditor being preferable over two tenements, and a secondary creditor having a right only over one of them, in that situation, the preferable creditor, for a separate debt, adjudged both tenements; it was found, That the catholic creditor, was not obliged to dispoise to the secondary creditor, in prejudice of his adjudication, existing before the date of the process. Stair, 6. Nov. 1678, Miln.—In a competition between a liferentrix, whose infestment reached over half of the subject, and a creditor, whose infestment affected the whole, and was prior to that of the liferentrix, and who had also an adjudication, but posterior to the liferent-right; she craving, that he might be decerned to assign her the one half, in regard the other was sufficient to pay him his annualrent; the Lords thought, That if he acquired any such adjudication, less preferable *post litent motam*, he might be reputed in *mala fide* to make use of such right to impede his assigning to the liferentrix, but if he had got it before, then there was no law hindering him to do the same, and to cover it by his better right; and so the Lords refused to decern him to assign the liferentrix against the other half in prejudice of his adjudication. Fount. Jan. 1696, Scotland.—An assignation to some goods by a bankrupt to his creditor, in security and payment, being reduced upon the act 1696, by another creditor, and the reducer, at the same time, arresting in the assignee's hands, and suing a forthcoming; the assignee was contented to make the goods forthcoming, but craved assignation from the pursuer to his cumulative security by adjudication, in so far as he should pay, that he might operate his relief out of the common debtor's effects *pro tanto*; the Lords found this relevant, and ordained the pursuer to assign, but with this express qualification, That the pursuer should be preferred *quoad* his debt, and the assignee should not compete with him for

the same. Fount. Forb. 19. Dec. 1705, Reid.—A party having two infestments of annualrent, one prior, and another posterior, to the infestment of another creditor, whose infestment was only of a part of the lands, he who had the first and third, being infest in the whole, and taking up his annualrent out of that part only wherein the other stood infest, whereby that other was disappointed; and therefore, craved in a process to be assigned to a proportion, &c. The Lords found, That where a posterior creditor pays a prior out of his own money, he has a title to demand assignation; but if he leaves him to get his payment out of the debtor's means, the catholic creditor is not obliged to assign, but with a quality and reservation, that it shall not prejudice his other debts and rights, tho' posterior to the party's right who craves the assignation. Fount. Forb. 21. Dec. 1710, Pitcairn.—Brigadier Preston, purchaser of the estate of Valleyfield, at a public roup, offered to the Lords a scheme for drawing the price, wherein it appeared, That he had right to some debts preferable over the whole estate, and to others preferable over particular parcels; and pretending to exhaust the remainder of the price of the separate parcels, affected by his catholic debts, in order to bring in the other debts purchased by him, preferable, as said is, upon particular parcels. This was opposed by Colonel Erskine, who alledged, That the catholic debts, preferable upon the whole estate, ought to be taken out of the whole head of the price, whereby the price of every particular parcel of the estate would be diminished proportionally; and he, the Colonel, of consequence, would draw some share of the remainder of the price; whereas, by the Brigadier's scheme, he was entirely excluded. The Lords found the Brigadier might exhaust the price of any part of the estate, by his sovereign rights, affecting the whole, and that he might make the best use he could of his rights, provided the same was not acquired or made use of in *emulationem* of the Colonel. Dair. Bruce. 22. Feb, 1715, Brigadier Preston.—A creditor, ranked in the second place, did, after the ranking, purchase the preferable debts, and having these two rights in his person, he became purchaser of the estate at a public sale, and gave bond for the price, payable to the creditor.

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ditors as they were ranked; the preferable debt purchased in by him, as said is, did not only reach over the lands purchased by him at the public roup, but also over a separate subject belonging to another. The fact was, That the price of the lands, sold publicly, was but sufficient to answer the preferable right; and therefore the purchaser, willing to bring his secondary claim within the price, craved payment of his preferable right, entirely out of the separate subject; which the Lords refused, and found, That the said debt, being in the person of the purchaser of the lands, upon which it was ranked *primo loco*, which purchaser granted bond for payment of the price to the creditors as ranked, the said debt became *eo ipso* extinguished *confusions*, and could not revive to be a charge upon the separate subject. 13. June 1729, Competition between Ramsay, &c.

A CREDITOR by bond, wherein three persons were bound as co-principals, being the first arrester of a subject belonging to one of his debtors, was found not obliged to assign his bond to the other arresters, for recovering from the other two co-principals, the surplus paid to him out of the common debtors effects, more than his third share, altho' relief of two thirds was competent to the common debtor himself against these co-principals; for this reason, That the creditors postponed, might affect the said relief by diligences. Forb. 24. Feb. 1708, Kennedy.—Robert Scot, served heir in general, and confirmed executor *qua* nearest of kin to Sir William Scot, conveyed all subjects, heritable and moveable, that he had right to by these titles to Ker of Chatto. Some of Sir William's real creditors, insect in his land-estate, having also affected by diligence their debtor's other effects, conveyed, as said is, to Ker of Chatto, were in a competition preferred to the disponent. Ker, thus excluded by the preferable creditors, demanded assignation to their debts and diligences, in order to affect the real estate. It was answered for the creditors, That no person is entitled to demand assignation, unless against his own debtor's effects. The Lords found, That, in so far as Sir William Scot's creditors are either paid out of his estate, or out of his other effects, they are not bound to assign their debts and diligences in favor of Chatto. Forb. MSS. 29. June 1714, Scot.—In the year 1685, M^r Guffock, of Rusco, heritor of the lands of. Borgue, granted

granted an heritable bond, for the sum of L. 2000. out of the said lands, in favor of Irvine of Logan, whereupon the creditor was infeft the same year. Thereafter, Rusco granted a disposition of the lands of Borgue in favor of his second son Blair, reserving a faculty to alter, but which faculty he afterwards renounced in his son's contract of marriage; Rusco, being overcharged with debt, his estate, in the year 1727, was brought to a sale, and Irvine of Logan, who had adjudged all his debtor's lands, for the above mentioned debt of L. 2000, was ranked as a preferable creditor; and, upon his drawing payment, it was demanded by the other creditors, That he should assign them to his infeftment upon the lands of Borgue. This was opposed by the relict and children of Borgue, upon this *medium*, That by Rusco's disposition to his second son, and after consent in that son's contract of marriage, he became bound to warrant the said lands; the consequence whereof was, that, had Irvine of Logan drawn his whole sum out of their lands, they must have been entitled to demand assignation against Rusco, bound to them in warrandice. Answered, Rusco was never bound to warrant against Logan's debt; the disposition was under a reserved faculty to contract debt, alter, and dispose of the estate, &c. and supposing the son had paid the debt, he could never have distressed his father for the same; and consequently, an assignation would have been fruitless and ineffectual; nor did the father's, after consent in his son's contract of marriage, which implied a renunciation of his faculty, alter the case; For this could not be drawn to import an obligation upon the father, to warrant or relieve his son of the foresaid debt. The Lords refused the assignation. Jan. 1729, Creditors of Rusco.—Mrs Dalglieth, creditor to the Earl of Roseberry, arrested the rents of his estate in the tenants hands, as also a personal bond of his, in the hands of Alves the debtor; thereafter the same rents were arrested by Blair, another creditor, who, by decree of forthcoming, was preferred, *secundo loco*, on that subject; last of all, the common debtor granted assignation of Alves his bond, for onerous causes, to Robertson; the debtor in the bond raised a multiple-poinding, wherein the arrester was preferred to the assignee; Robertson the assignee, whose subject was thus carried away

away by Mrs Dalglish, the arrester, demanded an assignation to the arrester's debt and diligence; in order to operate his relief out of the other subject, affected thereby, *scilz.* the rents of the estate in the tenants hands. Against this demand, Blair, the second arrester of that subject, appeared for his interest; it was pled for him, That he could not be prejudged by the common debtor's assigning to Robertson. It was answered, That the common debtor remained fiae of the bond; just as much after Blair's arrestment as before, the arrestment not affecting the bond; and therefore, his assignation to Robertson, was valid and effectual in law, and did infer an obligation upon the catholic creditor, chusing to draw his payment out of a fund, that now no longer belonged to his debtor, to assign for a total relief. Replied for Blair, That the bond, being affected by the preferable arrestment, was made litigious; and therefore, still to be considered as remainig in the person of the common debtor. The Lords found, That Mrs Dalglish, was not obliged to assign to the assignee Robertson, in prejudice of Blair's arrestment. 12. June 1730.

Competition between Robertson, &c.—George Gordon lent 1000 merks upon bond, conjunctly and severally, to Kincaid and Suittie, Kincaid got the money, and gave Suittie a bond of relief; upon this bond, after the term of payment, diligence was done by horning and inhibition. Thereafter, Kincaid, Suittie and Johnston, conjunctly and severally, granted bond of corroboration, containing a clause, obliging the other two to relieve Johnston as their cautioner. Johnston after this, and after existence of the inhibition, lent Kincaid, the common debtor, L. 100 Sterling on an heritable bond. Last of all, Johnston paid the debt wherein he was cautioner, and took from Gordon, the creditor, assignation to the debt and diligence, and insisted against Suittie, for relief. In this process the question occurred, Whether Johnston was bound to assign the inhibition to Suittie upon payment? Johnston pled, That the inhibition, striking against his heritable bond, the law did not oblige him to assign against himself. Suittie contended, That this rule holds not between cautioners, who demanding relief of one another, are bound in strict law, from the nature of the contract, to assign. The Lords found no necessity upon Johnston to assign the inhibition. 12. Nov.

1730,

1730, Johnston.—A wife, consenting to infeftments of annualrent upon her jointure-lands, the annualrenters, after drawing their payment, must assign her to any other subject in which they are infeft, in order to relieve her of what she suffered by yielding them the preference. Home, 17. Feb. 1727, Competition Sinclair, &c.

A CAUTIONER, in a contract of marriage, being sued by the relict, her claim was found

The creditor's passing from his separate security, is a liberation to the cautioner. compensated and extinguished, by the sums and goods she had confirmed in her husband's testament; and, that altho' several of them were evicted from her by sentences, at the instance of his creditors, in regard she was entitled to have pled a preference to the creditors,

upon her contract of marriage, and neglected to do it.

Dur. 4. July 1628, Hamilton.—A creditor, having apprehended the principal debtor upon a caption, and kept him some days in the messenger's hands, and thereafter let him at liberty; this was found not sufficient to liberate the cautioner; It was yielded, That a creditor can pass from no consummate diligence or security, to disappoint the cautioner's relief, but he may begin, without being obliged to finish any diligence: Thus, tho' he take out a horning, he is not bound to charge or denounce, or take out a caption, or put that caption in execution; and if there was not a discretionary power left to the creditor, it would be the occasion of most unmerciful distress; neither is there any thing more usual, than for the creditor to stop when the messenger has touched the party, and to take a bond of presentation, or such other security as he can obtain. 21. Jan. 1729, M'Millan.—The like; 16. July 1730, Grahams.—There being a clause in a wadset-right, That in case the wadsetter should think fit to take possession, both principal and cautioner should be free of annualrent, during the years of his possession; and the wadsetter, after being several years in possession, voluntarily quitting the same, without any intimation made to the cautioner, the cautioner was found liable for annualrent in time coming, from the date of the process, but not for bygoness. Goss.

24. June 1670, Robson.—The creditor having consented to the relaxation of one of the cautioners, after he had denounced him, and thereafter, in common with some

Some other creditors, having obtained a gift of his estate, but being excluded in a process, in respect of his said consent, in a charge against another cautioner for the debt which was suspended; the Lords found the charger liable to make up the damage sustained by the suspender, by his the charger's consenting to relax the co-cautioner. Dalr. 25. Jan. 1717, Wallace.

THE creditor, getting payment from the cautioner, was not only obliged to assign him for his relief against the principal, but likewise was decreed to convey to him a separate security, which he had obtained *ex post facto* for the same debt. *Must assign every separate security he has for the debt.* Stair, 10. Jan. 1665, Leslie.

A CREDITOR of a tenant's, having arrested corns belonging to his debtor, in a third party's hand, a cautioner in the tack, who had been forced to pay the tack-duty to the setter's creditors, appeared in the forthcoming, and pled preference upon the right of hypothec. Answered, The right of hypothec was extinct by payment of the rent, the cautioner having demanded no assignation of the same from the setter. Replied, What a party is bound to do, the law holds as done: here the tack-duty was drawn out of the cautioner's hands by the setter's creditors, so that there was no opportunity to demand assignation from the master; the law supplies this, and the cautioner pleads upon his legal assignation. The Lords preferred the arrester, in respect the cautioner had not an actual assignation from the setter to the tack-duty and hypothec. Feb. 1735, Garden.

A CAUTIONER, upon paying the debt, having obtained an ease from the creditor; the Lords inclined to think, That he ought to communicate the same to the principal debtor, yet they allowed him to be further heard thereupon. Found. 6. Feb. 1702, Halyburton.—A cautioner transacting the debt for a lesser sum, and obtaining assignation, was found only to have relief against his

One entitled to relief, getting an ease upon payment, can claim nothing but the transacted sum.

co-cautioner for half of the sum paid by him upon the transaction; for being engaged in a mutual relief, like partners in a society, they ought to do every thing toward the common interest. Stair, 27. July 1672, Brodie.—The contrary had been found. Stair, 8. July 1664, Nisbet.—The seller being obliged to relieve the purchaser, of the composition for his entry to the lands; it was found, That the purchaser could have no claim, if the composition was remitted to him by the superior, altho' he got it for other good services. Stair, 4. Feb. 1662, Elphinston.—A procurator-fiscal, by a judge's written warrant or mandate, having summarily poinded some goods without a preceding charge or precept of poinding, and the fiscal being thereupon sued for a spulzie, which he could not deny upon oath, and being decerned by the Lords for the value and violent profits, amounting to a vast sum, so that he was forced to transact and take an assignation, and then sue the judge, by whole warrant he acted, to refund his damage; the Lords found, That the fiscal could not recur in warrandice for more than he paid himself, with the expence of this process. Fount. 24. Jan. 1712, Gordon.—A party, *tangquam quislibet*, purchasing debts, is not bound to communicate the cases to the debtor. Dur. 9. Feb. 1639. Hamilton.

A DISPONEE to land, burdened with an heritable debt, is entitled to demand an assignment upon payment. Rem. Dec. p. 259. Fullerton, 12. June 1751.

A CO-obligant in a bond, is entitled to demand from the creditor, a conveyance to any collateral security, which the other co-obligant has granted to the creditor. Fac. Col. vol. I. p. 12. Blackwood, 9. June 1752.

PERSONAL creditors of an heir of entail, purchasing the real debts affecting the estate, are entitled in a question, with the succeeding heir, to waive their preference on the real debts, and to apply the rents, which became due during their debtors life, in payment of the personal debts, after paying the annual rents incurred during that time, upon the real debts. Fac. Col. vol. II. p. 18. Buchan, 19. Jan. 1757.

RELIEF among *correi debendi*, whether in *solidum*, or only *pro rata*? See *Solidum et pro rata*.

RIGHTS affecting the subject acquired by the debtor,

nee, cannot be extended against the disponent, bound in warrandice, farther than to pay the transacted sum. See *Mutual contract*.

SUPERIOR taking a gift of recognition, &c. how far he can extend this against his vassal? See *Jus superveniens*.

CREDITOR, bound to maintain possession of the subject he derives from his debtor, in security of his debt, and cannot invert possession to his prejudice. See *Mutual contract*.

DECLARATOR.

A DONATAR to ward-lands, may enter to the possession of the ward-lands, actually possess'd by the deceased, without declarator, but it was found ejection to dispossess the tenants before declarator. Had. 4. June 1595, Fletcher. *Gift of ward, if it requires declarator?*

AN adjudication was found null, being founded upon a gift of non-entry, without declarator, for non-entry must be declared, in order to make it become a liquid debt. Fount. 19. July 1678, Fotheringham. Sinc. 16. July 1541, Borthwick. — But declarator of non-entry was found unnecessary, where the gift was in favor of the heritor himself. Had.

—The superior of ward-lands may remove tenants without declarator, but not in case of non-entry. Balf. (*Removing*) 28. May 1540, Dunoon.

A GIFT of *ultimus hæres*, must be declared the same way as a gift of bastardy. Stair, Gilm.

30. July 1662, Balnagowan. Stair, Newb. Dirl 31. July 1666, Crawford. *Gift of ultimus hæres, and of bastardy.*

Harc. (*Removing*) Feb. 1684, Taylor. — Yet a gift of bastardy was found not to require a declarator. Fount. 26. Feb. 1684, Taylor. But here the case was singular.

GIFT of liferent escheat was not sustained without declarator, tho' proponed by way of exception. Stair, 18. Dec. 1668, Swinton. — A debtor, at the horn, being relaxed, was found preferable, in

a competition, to the donatar of single *Gift of single and liferent escheat.*

escheat,

escheat, who had a general declarator depending, finding only caution to make the subject forthcoming to the donatar, in case he prevailed in his declarator. Had. 28. Nov. 1610, Whytbank.

FOUND, that a gift of recognition, without declarator, altho' the donatar attain possession,

Gift of recognition. cannot take away a feu-infeftment, whereof the feuer was in possession.

Auch. (Recognition) 27. Nov. Black.

—The active title, in a reduction and improbation, being only a charter and sasine upon a gift of recognition, which was never declared; the Lords refused to sustain process upon this title, tho' the pursuer was in peaceable possession, and the charter contained a *novodamus*. Fount. 24. Nov. 1699, Master of Balmerino.

THO' a gift of forfeiture, pronounced in parliament, needs no declarator, there can be no

Gift of forfeiture. action upon such a gift, without declarator, where the forfeiture is in virtue of a sentence before the Court of

Justiciary. *Harc. (Forfeiture)* March 1683, Livingston.

A FATHER, infefting his own child in an annual-rent, redeemable by himself for a small

Redemption. sum, and in his own lifetime redeeming, the Lords found no necessity of a

declarator of redemption in this case. *Auch. (Redemption)* 29. July 1629, Philip.

A BOND, being granted for security of the creditors payment, in case of failure, the debtor,

Failure. giving the creditor charter and sasine of some lands; in a process of mails

and duties thereon, against the tenants, the Lords found,

That first, the pursuer behoved to obtain declarator upon the failure, against the principal debtor, because the defenders could not know if the pursuer was paid, or if the failure was incurred, &c. *Dur.* 21. Jan. 1624, M'Math.

AFTER sentence of divorce, pronounced *propter culpam mariti*, the wife may immediately enter to the possession of her

Divorce. liberent-lands, without any declarator.

Colv. 6. Feb. 1579, Restalrig.

BY a contract of wadset, the wadsetter being liable to accompt for the excrese of the duties, more than should satisfy the annualrent; the Lords, in a process of mails and duties, found the exception relevant, that the pursuer was satisfied of the sum upon the wadset by his intromission, without declarator. Dirh. 25. July 1673, Murray.

Extinction by intromission.

IRRITANCY, *If it requies declarator.* See Irritancy.

DECLINATOR.

DEADLY feud, between a party and the inferior judge, was found a good reason of advocacy. Balf. *Inimicitia capitales.*

(Advocation) 4. March 1545, Methven.—An inferior judge's decree, being reduced upon the head of iniquity, the party, at whose instance the reduction was obtained, was found thenceforth exempted from the jurisdiction of that judge, in all other causes. Balf. (Advocation) 6. Feb. 1561, Sheil.

FOUND, that if any Lord of Session, or other judge, say to a party, or his procurator, That he might have better libelled, or answered better to the libel, he, as suspect, and partial in the cause, may be removed at the desire of the party. Balf. (Judge) 15. Feb. 1532, Master of Glencairn.—Found, That if a party propone a declinator of the judge, as having given partial counsel, or the like, and the judge, at the party's desire, purges himself thereof, the cause cannot thereafter be advocated upon that ground. Balf. (Exception) 2. May 1548, Weir.

Partial counsel.

A CURATOR *ad negotia*, cannot be judge in the minor's cause, altho' the minor have also curators *ad litem*. Mait. 17. March 1555, Leithington.

Curator in his minor's cause.

THE Lords found the bailies of a burgh competent judges, concerning debts due to the burgh. Forb. 17. July 1706, Town of Dunbar.

Magistrates in the burghs concerns.

FOUND, that some of the Lords of Session being

those arbiters in a cause, may, never-
*Arbiter in que-*theless, sit and vote with the other
sions upon the Lords in the execution of the decree-
decree-arbitrat. arbitral. Colv. Aug. 1591, Colu-
 thie.—Found, that a Lord of Session,
 who drew up a contract, might be declined, when any
 cause was intended upon the same. Had. 26. July
 1605, Clerkington.

IN a question, Whether one of the Lords might be
 declined in a cause, where one of the
*Degree of rela-*parties had married his niece? The
*tion necessary to*Lords found, That he might be declin-
*found a decli-*ed in any cause, carried on immediately
nator. by his niece, but not in her husband's
 concerns, that were not derived from

her. Fount. 31. Jan. 1712, Calder.—Found, That by act
 13. parl. 1681, the degrees of affinity reach only to
 father, son and brother, and not to nephew, brother's
 son, &c. seeing, properly, those in that degree, are
 either consanguineans, or absolute strangers. A bro-
 ther-in-law's son, by my sister, is not *affinis*, but *con-*
sanguineus to me; and a brother-in-law's son, by ano-
 ther wife than my sister, is not *affinis* to me, but an
 absolute stranger, seeing *affinitatis nulla affinitas*. It
 was pled, That by the said act, the affinity of *soer,*
levir, gener, father, brother, and son-in-law, was only
 meant; which arises from a conjunction with a con-
 sanguinean, and not of the affinity of *vitricus, privig-*
nus, &c. step-father, step-son, &c. But this point was
 not determined. Harc. (*Declinators*) March 1692,
 Maxwell; where it was also debated, If a judge might
 be as well declined upon his wife's account, as upon his
 own.—The Lords repelled this declinator against Lord
 Harcarfe, That Sir William Binning, the pursuer, was
 brother-in-law to my Lord, by marrying his lady's
 sister, and was also uncle-in-law to my Lord's lady,
 who was then deceased, but had left a child of the mar-
 riage behind her; that relation being only *affinitas af-*
nitatis, which the act of parliament extends not to. And
 the like declinator, in another case, against Lord Har-
 carfe, That Hugh Wallace and he had married two
 sisters, was rejected, the lady being dead. Harc. (*Pro-*
bation) Dec. 1687.

ALTHO

ALTHO' a procurator fiscal, decerned executor, sue *ratione officii*; yet, where he did not surrogate one in his place, the action was advocated, because the judge was his kinsman. Spot. (*Advocation*) 8. July 1629, Boyle.—And this, tho' the procurator was to reap no advantage thereby, but only the nearest of kin. Dur. 8. Jan. 1629, *inter eosd.*—In a process against a burgh, concerning a contract made with them, a declinator having been given in against one of the Lords, as being uncle to him who was town-treasurer at making the contract, tho' now *functus*; the Lords rejected the declinator. Fount. 27. July 1711, Paterson.

IN a process, upon the passive titles, it was objected against the ground of debt, That it was a decree in absence, holding the deceased as confest, obtained before the pursuer's uncle as judge; and that the act, 13. par. 1681, provides, not only that judges, in that degree of relation be declined, but that they shall not sit or vote in the cause of their near relation; and tho', upon a principle of equity, such decrees may stand to support legal diligence deduced upon them, where the claim can otherwise be instructed, there is no equity to sustain them as an instruction of debt; the Lords sustained the objection, and found the debt must be otherwise instructed, than by holding the deceased as confest. Dalr. 21. June 1699, Preston.

If sentence, pronounced by a relation, be intrinsically null?

DECREE.

WHERE a decree is *ex facie* formal, no objection can be sustained against it, but by way of reduction or suspension. Rem. Dec. p. 65. Anderson, Feb. 1743.

DECREE-ARBITRAL.

THE presumptive falshood upon a certification, in an improbation, is not sufficient to set aside a decree-arbital,

arbitral, founded on the writs struck at by the certification. Falc. vol. I. p. 11. Creditors of Ogilvy competing, 28. Nov. 1744.

A DECREE-arbitral, on a submission, empowering two arbiters, and in case of difference, one with an oversman, named in the submission, to determine on accompts, which a certain person was appointed to examine, and make remarks upon, being pronounced by the oversman and one arbiter, was sustained; tho' it was objected, It did not bear the arbiters had differed, nor had the oversman heard the remarks, nor heard one of the parties. Falc. vol. I. p. 125. Dunsmoor, 30. July 1745.

D E F O R C E M E N T.

*Penalty of
deforcement.*

TENANTS, that deforced their Lord's officer, were found to forfeit their tacks, and lose all their moveable goods within their master's jurisdiction; and this penalty was found to take place with respect to free tenants and feuers, both of spiritual and temporal Lords. Sinc. 19. Dec. 1541.

A LIBEL of deforcement was repelled, because a tenant, against whom it was raised, alledged, That he had made payment of the debt upon which the letters were raised, which was admitted to his probation. Mait. ult. Feb. 1561,

Abbot of Kilwinning.—Found, that an execution of poinding may be staid, without hazard of deforcement, either by a party pretending to have right to the goods, and offering to make oath thereon; or by a master for his hypothec, if security is not given him for his rent; but that these alledgeances must be proponed at the time of stopping the poinding, otherwise they will not defend against the deforcement, tho' offered to be proved in that process. Dur. 1. Feb. 1628, Halkerton.—Found, that a messenger might lawfully be deforced in the execution of poinding of goods in a shop, when he had not his blazon at the time, tho' he was known in the place. Harc. (*Deforcement*)

March

March 1685, Horse.—The Lords thought that a messenger was not bound to show his blazon in apprehending a man for debt, till he apprehended him, and touched him with the wand of peace, and therefore the omission of that was found to be no excuse of a desorcement, because, to show the blazon before, were to discover himself to be a messenger, and give opportunity to the rebel to run away; and some thought, that he was not bound to give the caption out of his hand, since, in these hubbubs, they might tear it. Fount. 18. Jan. 1699, Kinnaird.

DELINQUENCY.

IN a declarator, upon the act 220. parl. 1594. declaring, "That murderers and Parricides, derers of their parents and their posterity in *linea recta*, shall be disinherited, and the heritage shall pertain to the next collateral and nearest of blood," it was objected for the criminal's real creditors and his son, That the libel is not relevant, because, by the statute, it is expressly required, "That the criminal be convicted by an inquest," which is not, nor cannot be done, he being fugitive for non-compearance; the Lords found the statute to be *stricti juris*, and sustained the objection. Stair, Goss. 3. Feb. 1674. O'lephant.

THE exception of perjury does not elide the debt, but only founds a criminal suit. Fount. 12. Nov. 1695, Yeaman.

IN a suspension of a decree, obtained at the instance of a procurator-fiscal for a riot, notwithstanding of a disclamation by a private party, the Lords made no doubt, but that a procurator-fiscal may sue *ad vindictam publicam*, and were clear there is no parallel between the case of a procurator-fiscal, of a comifary-court, suing for scandal, and of a procurator-fiscal suing for a breach of the peace; that *diffimulatio*, abstractly considered, is not a good answer

to a procurator-fiscal suing *ob vindictam publicam*; seeing he may sue both parties; but then, upon perusing the proof, they found, That this was but a drunken squabble, in which the public is very little concerned; and that it was officious, in the procurator-fiscal, to intent a process in such a case, and therefore suspended the letters *simpliciter*. 25. July 1738, Gilmour.

A SERVANT of the custom-board being accused to his masters of drinking King James VIII. his health, for which he was turned out of his office by the commissioners,

and he thereon raising an action of scandal against the party who had informed the said commissioners, and the commissaries having granted him a diligence to cite them as witnesses; the Lords, in an advocacy, considered, That a scandal implied a public venting and spreading of the same, and that the informing the commissioners of the customs of the misbehaviour of one of their servants, could not make a man liable in a scandal, and therefore remitted the cause back to the commissaries, as the most proper and competent judges to such actions, but with this express direction and instruction, That private informations given, were not relevant to found a process of scandal; and also, that a libel of scandal, ought to be special as to persons, time and place, which was not the case here. Forb. 31. Det. 1708, Fount. 1. Jan. 1709, Watkins.—The authors of the Edinburgh Evening Courant, in publishing the news of a mob that happened at the West Kirk, about settling a minister in that parish, tho' they kept within bounds of truth, yet dressed up the story in colours very disadvantageous to some of the magistrates of Edinburgh, who were upon the spot attending the settlement, insinuating several sharp reflections against them; amongst others, several queries were adjected, such as, "It is
" submitted to the judgment of mankind, if there was
" much more order, caution and discretion, observed
" by those who took upon them to compose the tumult,
" than even by the mob itself. And it may be justly
" queried, Whether the ordering out the city-guard,
" without the bounds of the city, to act a part in this
" affair, and whether imprisoning Fleucker the beadle,
" were legal? Whether the town guard's firing, kill-

"ing and wounding so many persons, without reading the proclamation, as the law directs, be not a great crime? And whether the captain of the guard's beating Mr M'Vicar's children and servant, was not a manifest riot, if not homesucken?" This matter having been brought before the Lords in the shape of a reduction of an inferior decree, in which the news-writer had been fined in L. 10 sterling; it was pled for him, That news-writers, by inveterate custom, are tolerated to publish historical accounts of transactions, foreign and domestic, whether reflecting honour or reproach upon the actors. Answered, Libels of scandal are prohibited, in whatever shape they come out; the above paragraph is not in the spirit of a cool news-writer, but bears evident marks of rancour and resentment; and supposing the magistrates to have been in the wrong, the parties injured, or those employed by them, ought not to inflict punishment at their own hands, while there are laws in being, by which they may be redressed: For this reason it is, that *veritas convicti non excusat*. The Lords assilized from the reduction. 3. July 1733, M'Euen.

GRANTING of double rights, punished with confiscation of moveables. *Stellionat.*
Balf. (*Double alienations*) 15. Jan. 1505, the King.

THE Lords refused to sustain action of declarator of a person who had killed herself, she having been furious six months before. *Suicide.*

Hope, (*Horning*) — A man in Stirling, having given a mortal wound to another, and upon the friends, their pursuing him with drawn swords, taking the water of Forth; and having drowned; The Lords found, That his escheat did not fall, because the deed was not self-murder. Had. ult. Jan. 1610, Shearer.

THE transacting theft, but not concealing the crime, was not found to be theft-boot. Fac. Col. vol. II. p. 56. Warrant, &c. 2. July 1757. *Later decisions.*

A PERSON punished for a riot committed in the church, tho' in recovering a continued possession. Fac. Col. vol. II. p. 61. Hunter, 6. July 1757.

DELIVERY

DELIVERY.

A DEED, in favor of a wife and children, given to her, was held delivered for her use, and that of the children. *Falc.* vol. II. p. 129. *Riddel.* 16. Jan. 1750.

DELIVERY not necessary in transferring subjects from the dead to the living. *Rem.* Dec. p. 271. *Lan.* dale, 12. June 1752.

DEPOSITUM.

What understood a depositum? **I**N a suit, at the instance of a nobleman against his taylor, for delivery of his parliament-robcs, deposited with him, the Lords found it not sufficient to libel, That the same were lodged in his house, and expressly committed to his custody and keeping, unless the pursuer had also said, That the key of the trunk, where the robes lay, was delivered to the defender, and that he took upon him the custody thereof, and to be answerable therefor. *Dur.* 18. March 1626, *Cassilis.*

A PARTY, that was sued for delivery of writs deposited with him, was not heard to allege, That, for eschewing *periculum vis majoris*, he delivered them in sure keeping to another, because the pursuer had only action against the defender, who might again sue any other to whom he delivered them. *Had.* 23. Jan. 1503, *Buchanan.*—In an action of exhibition of a bond granted to a father, and deposited by him, for the benefit of his daughter, in a third party's hands, provided she accepted it in satisfaction, and gave up her mother's contract of marriage, the depositary having deponed, that he received the bond on these terms, but, that thereafter he was called before the magistrate of the place, by another man, and summarily incarcerated, and forced to deliver up the bond, on receipt, to that man who pretended he had right to it, before he could obtain his liberty. The Lords ordained

dained him, either to deliver up the bond to the pursuer, the renouncing as above, or else pay the sums therein contained, *nomine damni*, reserving his recourse against the person who got it from him. Fount. 7. Nov. 1696, Braidy.

SOME merchants, having entrusted two barks-loading of Spanish salt, with a party at the Lewis, who gave two receipts for the same; that, to one of the skippers, *Effect of an actio depositi* bearing, That he should either deliver the salt, or else the equal quantity and quality at Lelsh, when demanded; and that to the other skipper, bearing precisely, That he should keep the salt, therein-mentioned, as he did his own, and dispose of it as they should order; and they having, three years thereafter, required them to deliver back the salt, when the price thereof was exceedingly risen, they having disposed upon it, and offering to pay them the current rates that salt gave when they received it, the Lords, in a process against them, found, That as to the salt contained in the first receipt, where the skipper had power of disposal, he was liable for the price of the salt, at the time of its delivery, or at the time of his making use of it, or the produce of the herrings that were cured with that salt, and gave the pursuers their election of any of the three; and, for that first ticket, refused to find him liable in the price that the salt was giving the time of the requisition; but, as to the second receipt, where there was a clear *depositum*, and no power given the skipper to intronit therewith, (tho' he pleaded it to be one of these things, *quæ servando servari non possunt*, and that therefore, he rather deserved thanks for disposing of it before it should perish) the Lords found, That he having intronitted with, and disposed of it at his own hand, without any warrant or allowance from the owners, he must be liable for that price, which salt was giving at the time of the requisition. Fount. 9. Forb. 19. Jan. 1711, Watson.

DESUETUDE.

DESUETUDE.

THE act, 14. parl. 1621, anent playing at cards and dice, found not to be in desuetude; Stair, 12. Nov. 1668, Park.—In a trial of a gift from the king to Moncreif of Reddie, giving him the heritable presentation of one of the macers to the Court of Session; it was objected, That the gift was null by the 44. act, parl. 1455, discharging offices to be given out in fee and heritage, in any time coming. This was found to be a tender point; for, on the one hand, to find the act in desuetude, was to encourage Kings and their ministers to give away and dilapidate all offices; on the other hand, to find that act in *viridi observantia*, would be to alarm the nation, and unhinge all the heritable offices, which had been peaceably enjoyed time out of mind. Some were for making a distinction between those clad with possession, and this, which was only *in adipiscenda possessione*; yet this was still dangerous; for the Dukes of Queensberry, Gordon, &c. had got heritable rights of regalities, which were neither confirmed in parliament, nor corroborated with 40 years possession; and even the old ones might be quarrelled, and the prescription might be alledged to be interrupted by the King's revocations, minority, absence by banishment, and many other pretences. Therefore, to shun all these dangers, the Lords fell upon this expedient, That this nullity was not receivable by way of exception, but only in a reduction by the King's Advocate, authorised by his Majesty's special warrant. Fourn. 2. Feb. 1693, King's Advocate.—In a declarator of a right of constabulary, at the instance of Erskine of Dun, against the town of Montrose, it was objected, That the said right of constabulary was null, by the 44. act, parl. 1455, declaring, "That no office, in time to come, should be given in fee and heritage." It was answered, The act was gone into desuetude; which the Lords found, 25. June 1731, Dun.

DIES

DIES INCEPTUS.

IN a question about the return of a tocher, the wife having out-lived the year, and only six hours of the next day; the Lords preferred the husband to the tocher, and found, That in this case, *dies captus habendus est pro completo*. Stair, Fount. 25. Feb. 1680, Waddell.

A CREDITOR, being required in the terms of the act of parliament 1696, to alimēt a prisoner, and having forborn to do so, tho' the magistrates, according to the act, kept in the prisoner till the tenth day; and then, no offer of alimēt being made, did set him at liberty at 12 o'clock that day, alledging, That in such favorable cases, *dies captus habetur pro completo*. The Lords repelled the alledgeance, and found, That the days in the act of parliament were *tempus continuum*, and to be computed *de momento in momentum*; so that magistrates, having anticipated some hours, must be liable. Fount. 11. Nov. 1704, Blair.

THE Lords reduced a bond of cautionry, subscribed by a minor, altho' he wanted but twelve or eighteen hours of majority. Dur. 26. June 1624, Drummond.

DILIGENCE.

Diligence preftable by Apprifers.

EVEN after the act, 6. parl. 1621, an apprifers is only liable to ac- *Not bound to*
compt for actual intromiffions, and not *do diligence.*
for what he might have intromitted
with; for he is not bound to intromit with any more
than he pleases, or to do diligence. Dur. 16. Jan. 1634,
Tutor of Balmaghie. The like; Dur. 2. July 1625,
Kincaid.

IF an adjudger enter into the natural poffeffion of
any part of the lands, he becomes liable
for the rent *qua-tenant*; and so in a *If he enter to*
compt and reckoning with the debtor, *the natural pos-*
he has no claim, tho' his stocking should *session.*
perish, and he be a lofer on his poffef-
fion. Dur. 23. Dec. 1629, Dickfon.

AN

AN appriser, in possession, found accountable by a rental, as the lands paid at the time of

If to the possession of mailles and duties.

his entry, but prejudice of just defalcations; for the Lords thought, That altho' apprisers are only accountable for their intromission, that is, for such parts of the lands only as they enter to possess, and not for those they never possessed; yet, that in so far as they once entered to possess, they must do diligence. Gilma.

Dec. 1661. Stair, 4. Jan. 1662, Seaton.

IN a competition among creditors, he that was preferred *primo loco*, was bound by the

Excluding other creditors.

Lords *ad exactissimam diligentiam*, for recovery of his own payment, that so way might be made for the succeeding comprisers. Dur. 11. Feb. 1636, Colquhoun. Stair, 28. July 1671, Murray.—An appriser, excluding other creditors in a competition, and entering to possess, is accountable according to the rental, not only for intromission, but omission, and for both, till the apprising be satisfied; and thereafter, for all years of which he uplifts any part. Here it was argued, That an appriser, during the legal, is accomptable for the full rents, because he excludes others; which reason ceases after the apprising is satisfied. To which it was answered, That it is the appriser's part, who knows when he is satisfied, to relinquish the possession, which cannot be known by others, till the event of compt and reckoning; so that it is still truly because he excludes others, that he is liable, even after he is satisfied. Stair, 26. Jan. 1671, Casse.—One appriser, offering to prove another paid within the legal, in so far as he had taken a decree for mailles and duties against the tenants of the whole lands, and had uplifted part; and therefore, ought to accompt conform, seeing that by this decree, others, having real rights, compearing and competing on these rights, were excluded from intromission. The Lords found the said appriser liable to compt according to that decree, seeing others were excluded, unless he could instruct, That he did diligence against the tenants, and could not recover payment. Fount. Stair, 14. Jan. 1681, Muir.

IN a compt and reckoning against an appriser, at the instance

instance of another, not within year and day, it was urged, That the defender having formerly excluded the pursuer in a competition, ought to have done most exact diligence for recovering the rents; and that a horning and denunciation, with a caption never put in execution, was not sufficient; the Lords found, The defender ought to have poinded, unless he can show, that the same would have endangered laying the land waste. *Harc. (Comprising)* Feb. 1683, Muir.

What is sufficient diligence.

IN a declarator of expiration of the legal of an apprising, where the creditor had been in possession; the Lords found, That his having been interrupted in the possession, *via facti vel juris*, by the debtor, was sufficient to liberate him from accompting by the rental; and, that he was liable only for his actual intrusions, until it should be made appear, that he was again peaceably possessed. But this was only sustained in prejudice of the debtor who interrupted, there being no other creditors comparing. *Fount. Stair, 20. Jan. 1681, Burnet.*

Interruption of possession.

A TENANT who had a current tack, having, after comprising, deserted his possession, it was found, That the lying waste thereof, ought not to prejudice the debtor, but that the comprisinger ought to be comptable for the same, since he neither laboured nor set it, nor made any intimation to the debtor to take care of it. *Dur. 9. Feb. 1639, Hamilton.*

Tenant deserting his possession.

Diligence prestable by Assignees in security.

An assignation in security, taken by a creditor from his debtor to mails and duties, and intimated to the tenants, was found not to oblige the assignee to accompt for these rents, unless he had debarred the tenant or his creditors from uplifting. *Forb. 27. June 1706, M'Micken.*—An assignation to some accompts a tradesman's books, being granted by him to his

Not bound to do diligence.

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creditor

creditor for security, who suffered the accompts to perish by doing no diligence, and returned, after many years, upon the cedent's heir for his money; yet the Lords found him not accomptable for diligence, and that the debts perished to the cedent. Forb. 27. Fount. 28. Dec. 1709, Smith.—It was found, That a person getting a disposition to lands in trust, in order to sell the same, and pay himself of what was resting him by the granter, and not intromitting with the rents of the lands for several years, was not liable for these rents, unless it was instructed, that he entered to the possession. Bruce, 8. June 1715, Anderson.

A DISPOSITION to moveables, with symbolical possession, being granted in security of a

Partial intromission. debt, and the creditor intromitting with a part only, the rest remaining in possession of the debtor; he was

found liable only for his actual intromissions. Home, Feb. 1682, Home.—An assignation to a tack, in security of a debt, established by an investment of annualrent, was found not to make the assignee, entering to possess, by virtue thereof, liable to intromit beyond his annualrent, or accomptable for more. Forb. 22. July 1709, Duncan.

AN assignation being granted, with absolute warrant

Clauses inferring obligation to do diligence.

dice, "in case payment was not obtained;" the Lords found this relevant to assoilzie, viz. that the assignee had done no diligence to recover payment, because they thought, that such

a clause implied a necessity to do diligence, unless the assignee would prove, that the debtor was insolvent when the assignation was granted; and found it relevant to the defender, That the debtor had then a valuable estate. Stair, 7. Fount. 8. Feb. 1678, Executors of Stewart. See Gilm. Feb. 1664, Bruce, where the contrary seems to have been implied.

Diligence prestable by Annualrents.

IN a competition upon two annualrents, out of one barony, the Lords ordained the first annualrenter to do diligence within twenty days after each term; that after that time, the second annualrenter might do diligence, or otherwise, the lands to be divided conform to the annualrents, the first annualrenter to have his choice. *Stair, 15. Feb. 1662, Mowswal.*—In a similar case, the first annualrenter was allowed forty days after each term, to do diligence, after which it should be lawful to the second annualrenter to do diligence without respect to the prior infestment. *Stair, 26. July 1662, Ayton.*—It being alleged for a posterior real creditor, That the common debtor's relict, who was preferred, suffered the said common debtor's heir to uplift the rents, so that her annualrent running on, did exhaust the rents when he came to poind; the Lords declared, That, in time coming, the lady should be obliged to poind the tenants upon her decree, within forty days after the term at which the rent is payable, after which time there should be access for that other creditor to poind the ground, without prejudice to the lady to poind for the bygones of her annualrent. *Home, Feb. 1687, Whittingham.*

AN annualrenter is not liable for diligence, further than for payment of his annualrents, tho' he exclude others. *Stair, 26. Jan. 1671, Excluding a-Casse.*—A creditor by an heritable *thers.* bond and infestment, having obtained a decree of maills and duties against the tenants, preferring him to other competing creditors; the Lords found him accomptable for the rents due by these tenants, against whom he obtained the decree; but for his actual intromissions only, after their removal. *Forb. 21. Feb. 1712, Moncrief.*

Diligence prestable by Donatars.

A DONATAR of liferent escheat, who had given back-bond restricting the gift to his own payment, was found

found liable for no diligence, except in so far as he excluded others, or *dolose* deserted the possession; and the voluntary payment of the tenants, without sentence, made him not liable for subsequent terms. Stair, 17. Jan. 1678, Crawford. The like; Fount. 14. Jan. 1680, *inter eosd.*—A donatary of single escheat, being bound by back-bond to make forthcoming what was over payment of his own debt to the other creditors, was found only accomptable for his actual intromission. Fount. Harc. (*Escheat*) 18. Feb. 1686, Grange Dick. Home. Jan. 1687, Hamilton. But upon this occasion an act of sederunt past, making donatary liable to do diligence.

Diligence prestable by Liferenters.

IN a suit at a widow lady's instance, against her deceased husband's representatives, for making up the deficiency of her conjunct-fee; it was found, That she having possessed the conjunct-fee lands, for several years, without making any legal intimation to the defender of the deficiency, the same ought to assilzie him from all bygones, he proving the conjunct-fee lands to have been worth what they were given up for at the marriage, and it was found sufficient for him, in time coming, to offer sufficient tenants, for taking the lands at the said rental, and for whom he should be cautioner. Newb. 22. June 1666, Miltoun.

Diligence prestable by Executors.

THE nearest of kin, confirming some of the deceased's moveables, is not liable, tho' he knowingly omits others; for this debars no other party having interest, as they may confirm *ad omisssa*. Dur. 2. Dec. 1628, Pool. Dur. 18. June 1629, Peebles.—A brother, having confirmed himself executor, *qua* nearest of kin, neglecting a sister of equal degree, and having, *ex proposito*, omitted several articles out of the inventory, the Lords, *in parana* of this fraudulent omission, decerned the subjects omitted to belong solely to the sister, and found that the brother had forfeited his interest in the same. Fount. 16. Feb. 1703, Robertson.—An executor

executor obtaining decree, but doing no diligence, was found liable, unless he would prove the debtor was insolvent at the time of the decree. Gosf. 14. Dec. 1675, Thomson, &c.—The Lords found an executrix liable for diligence and omissions, altho', by the testament, the legataries, and others therein honoured, had power, in case of her refusing, or delaying to implement the deceased's will, to sue for, and affect the whole goods conveyed to her, as effectually as if the same had been directly disposed to themselves by the deceased. Forb. 23. July 1708, Elibank.—A man, having left a legacy of 1000 merks, out of the rests due by his tenants, the executor was found liable to have done diligence against the tenants, within the year, when the hypothec remained upon their goods. Stair, 21. Jan. 1673, Forbes.—An executor was not allowed to exhaust the testament, by an heritable debt paid by him, without distress, seeing he had omitted to do diligence against the heir for his relief, but behoved to take this heritable debt in his own hand. Fount. 26. Dec. 1704, Robertson.—The Lords found executor-creditors bound to do diligence for the whole inventory, just as any other executor, and that not only for the payment of their own debt, but that the surplus may be made forthcoming to the rest of the deceased's creditors, and others having interest. Gilm. June Dir. Newb. 27. July 1666, Craig. Fount. 7. Feb. 1679, Pearson.—Executor-creditors having given up inventory, far exceeding their own debt, and being confirmed, were found not liable to the surplus of the inventory not intromitted with, or to shew diligence against the debtors, but only *cedere actionem* to another creditor, or nearest of kin; and this the Lords declared they would make a practice in all time coming. Gosf. 18. July 1671, Harlaw. See act of sederunt, 14. Nov. 1679.

Diligence prestable by Tutors and Curators.

THE Lords found a tutor liable in omissions, and for the whole duties of the lands where-
 in the minor's father died intest, altho' he never intromitted therewith, and this, notwithstanding the minor

Must do diligence.

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himself was not infest, since that was still the tutor's fault. Dur. 26. Jan. 1628, Commissary of Dunkeld.—

A tutor, not doing diligence for bonds left in the deceased's charter-chest, which were granted to the grandfather, and were never confirmed by the pupil's father, was found liable, only the pupils were first found obliged to do diligence, that it might be known whether the debtors were *solvendo*. Gosf. 17. Feb. 1670, Balfour.—Found, that tutors were liable to do diligence for all bonds and tickets, whether contained in the inventory of the deceased's testament or not, as also for all accompts in the deceased's compt-book, tho' not contained in the inventory of his testament, being contracted within three years of his decease; and as to other accompts preceding these three years, before answer; ordained the pursuer to condescend what of the debtors, therein contained, were alive within year and day after the tutors accepting of the office, so as they might have done diligence, and referred the accompts to their oaths. Fount. Duff.

THE dubiety of a pupil's right, found to be no ground nor defence whereon a tutor could seek to be exonerated from not having done diligence, in order to ascertain the same. Fount. 11. Feb. 1702, Elphinston.—

A father having given up, in the inventory of debts due to him, a sum promised by his wife's brother, over and above the tocher; in a suit, at the instance of his daughter against her curator, for suffering this debt to perish, but no other writ appearing for it, except the inventory; the Lords assilzied the curator. Fount. 14. Dec. 1710, Smith.

A TUTOR was found liable for annualrent of the pupil's money run on unuplifted during his office, and was refused liberty to discharge himself for what yet rested in the hands of responsal debtors; but the Lords ordained the minor to furnish him with the bonds for procuring payment of the outstanding annualrents. Forb. 11. June 1709, Riddoch.

IF the pupil's debtors be unquestionably *solvendo*, the

DILIGENCE.

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the tutor can have no occasion to do diligence; but if a debtor or his cautioner be *vergens ad inopiam*, the tutor is bound to do all diligence for uplifting the sums, unless the debtor become entirely bankrupt suddenly, which the tutor could not foresee, in which case he is not liable. Stair, 9. July 1667, Steven.—In a nomination of tutors, the father, among others, pitched upon a debtor of his own, and this tutor having suddenly broke, after several years management of the pupil's affairs; in a suit, against the co-tutor for payment of this debt, the Lords found that co-tutors are not liable for one another's debts, but only for administration of their office; and sustained the defence, That the tutor was held solvent till he broke off a sudden. Fount. 7. July, Dalr. 26. Nov. 1699, M'Murdoch.

If a debtor becomes suddenly bankrupt.

A TUTOR was not found liable to pay a debt due to his pupil, which had been lost by a bankrupt debtor during his management, tho' he had done no sort of diligence against the debtor, by hounding, caption, or comprising, during the space of three years, unless it was alledged; that the debtor was at the time in such circumstances, that money might have been recovered by virtue of such diligence. Dur. 2. July 1628, Hamilton.—The like; Had. 6. Feb. 1623, Watson.—The tutor's cautioners being sued for the tutor's omissions, in not doing diligence against some of the pupil's debtors; and an answer being made, That he was stopped by the surcease of justice, in Nov. 1688, and died shortly thereafter; besides, that many of the debtors were insolvent, so that it was casting away money to sue them; the Lords thought it too strict to require diligence of the tutors in this circumstantiated case, and therefore allowed them to prove, that these debtors were then habit and repute insolvent. Fount. 16. Jan. 1696, Irvine.

Cui incumbit probatio of bankruptcy.

A CURATOR continuing to intro-

Continuing to intromit after expiry of his office.

mit after expiring of the curatory, is only liable for his actual intromissions, not for any diligence or omission. Gosf. Stair, 18. Nov. 1671, Cals,

A TUTOR

A TUTOR is bound to do diligence according to the circumstances of the debtor: if there is land, he must apprise; if goods, poid; if sums, arrest; and, *in subsidium*, to use personal execution. Stair, 9. July. 1667, Steven.—A tutor's adjudging the debtor's estate for a debt due to his pupil, it was found a sufficient diligence to exoner him, tho' moveables were condescended on which he might have affected; for besides the loss of apprising moveables, it crumbles down and breaks a principal sum. Fount. 25. Feb. 1693, Cathcart.

Diligence prestable by Factors and Mandators.

A FACTOR is liable to do diligence, if the factory contain a salary, tho' not containing any clause obliging him to do diligence. Stair, 17. Jan. 1680, M'Bridie. — *In what cases liable to do diligence.* — A factor named by the minor's father, was found not liable for annual-

rent of money uplifted by him, unless it had bore annual rent, or that he had got annual rent for it, and so was *lucratus*, in respect the factory did not oblige him to employ or to do diligence, nor contained a salary, which imports diligence. Harc. (*Minority*) 3. March 1683, Sutherland. — A party being sued by an heritor for several years intromission with the rents of a barony, for which he had no written factory or commission, but only verbally as a friend, and the witnesses having deposed touching his partial intromission with some of the rooms, which was urged as a general intromission to make him accountable for the whole, this the Lords repelled. Fount. 8. Feb. 1701, Irvine. The contrary! Home, March 1686, Queensberry. — Mandators are liable in diligence, where the mandate requires diligence, as a factory, or the like; but a power to receive money, given to one as a friend, not as a factor, does not import diligence, but only that he should present his commission and receive the money. Stair, 17. y 16. 72, Wemyss.

IN a compt and reckoning, at the instance of an heritor

ritor of a sequestered estate, against a factor appointed by the Lords, who, during his factory, got a disposition in trust from the pursuer, and, by virtue thereof, had transacted all his debts; the Lords found the defender liable to accompt at a rental, and not for his actual intromissions only, altho' the pursuer had a promiscuous intromission. Forb. 18. July 1710, Gibson.

Factor, appointed by the Lords.

THE Lords refused to exoner a chamberlain of the crown rents, in answering and being liable for the rests due by the vassals or tenants, by his instructing diligence done for the same, the treasury and exchequer not being in use to take rests off the hands of his Majesty's chamberlains, sheriffs, stewards or bailies, who are bound to sit their *agues* yearly in exchequer, and get letters of relief against the debtors. Forb. 27. July 1708, Douglas.

Chamberlain of the crown.

FOUND, That a chamberlain or factor, is not bound to poind tenants, if they have sufficient goods and corn to sow and labour, because, that by pointing, the ground would be laid waste. Gosf. 14. July 1676, Viscount of Oxenford, &c.

What understood sufficient diligence?

Diligence of Trustees, properly so called.

A TRUSTEE found not liable to diligence, tho' he did possess, but only for his actual intromission, being, by a back-bond, obliged to demide whenever the truster pleased. Stair, 18. Dec. 1666, Casf.—A person assigned to a bond, with an obligation to do diligence against a debtor, between and a certain day, altho' the debtor die before the day, yet if he knew thereof, and suffered another creditor to comprise, and himself do no diligence within year and day thereafter; the Lords found him liable for the whole debt assigned, for which he should have done diligence. Gosf. 10. June 1674, Wemyss.—A merchant, with whom bills of exchange, with blank indorations were deposited in trust, having, by a writ under his hand, owned his receiving of them, and that

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he was to negotiate them for the truster, upon getting his allowance of necessary expences and debursments; the Lords found him liable to exact diligence. Forb. MSS. 26. June 1714; Stark.

A CAUTIONER, accepting of an assignation, bearing to be for relief of his own and another's cautionry, was not found obliged to do diligence for the benefit of the other cautioner, unless he was required, either to do diligence or to transfer. Stair, 18. July 1672; Watson.

TWO cautioners having paid the debt, and an assignation being taken in the name of one of them, who granted a back-bond to the other, obliging himself to do diligence against the principal debtor for their common relief; in a suit, upon the back-bond, it was not sustained to the defender, That, at the date of the back-bond, the principal debtor was habit and repute insolvent: for it was found, That he ought, at least, to have taken out a caption, and attempted an incarceration. Fount. 29. Nov. 1711; Torquhan.

Diligence Nimious.

A MAN, having suddenly perished at sea, and another, who was his creditor, getting himself, within fourteen days, confirmed executor-creditor, this was found nimious diligence, and the decree-dative reduced at the instance of the deceased's son, with concurrence of the other creditors, he finding caution to compt: only the Lords declared, that they would have consideration as effeired of the defender's diligence, and what preference he should have thereby. Dur. 26. March 1631; Winram.

A PERSON having a right, for the relief of himself and others, who were jointly bound for
Later decisions. another man, and not doing diligence on it against the debtor, when he did it for other debts of his own, was found not entitled to relief against his co-obligants, on payment of the debt wherein they were bound. Falc. vol. I. p. 4. Sinclair, 9. Nov. 1744.

A PERSON, who had undertaken a factory, to obtain another decerned and confirmed executor to a deceased

ceased relation, having acted remissly, and the constituent dying before any confirmation was taken out, whereby his relict, to whom he had made over his right, came to be excluded, the factor was found liable in damages to the relict. Fac. Col. vol. II. p. 3. Goldie, 4. Jan. 1757.

NEGOTIORUM gestor, lending the person's money, for whom he acts, upon insufficient security, is liable in reparation. Fac. Col. vol. II. p. 33. Maule, 4. March 1757.

Factor *loco tutoris*, is liable for omissions. Fac. Col. vol. II. p. 457. Children of Lizars, 27. Nov. 1760.

DISCHARGE.

A DISCHARGE granted to a tutor, was found not to operate a total liberation to the co-tutor, unless the discharge had borne payment or satisfaction, but only in so far as it would cut him off from relief. Stair, Gosf. 19. Dec. 1668, Seaton.—The pursuer

Discharge to one correus, how far it operates in favor of others.

of a *spulzie*, discharging either the principal actor, or any of the accomplices, was found to liberate all the rest. Bal. (*Spulzie*) 14. March 1533, Muir. 22. June 1554, Kinsawns.—The like; Colv. June 1583, Garne.—A man, from whom goods were *spulzied*, having transacted generally with any of the parties, and discharging him, was found sufficient to take away the action *in totum*, and relieve all the *correi*: but the pursuer having discharged only one of them for his own part, it was found, That such a discharge did not cut off the action against the other defenders. Had. 23. Feb. 1609, M'Naught.—He who transacted with one of the parties whom he sued for *spulzie* and ejection, receiving satisfaction, &c. was found to prejudge himself with respect to his action against the rest of the defenders; but having discharged him without any satisfaction, and only because he knew his innocence, this was found not to evacuate his action against the rest. Had. 27. July 1610, Aberzeldie.—The Lords found this exception relevant in a *spulzie*, That a discharge was

was given to one of the parties, altho' it was provided in the transaction, That it should not prejudice the pursuer of his action against the remanent defenders. Hope, (*Spulzie*) 20. June 1611, Douglas.—A person of quality's factor being by him sued for some years rents, and he alledging that he was employed only as a factor under the principal chamberlain, whom the pursuer had discharged, which must accresce to liberate him; but that discharge being without any previous compt, and alledged by the pursuer to have been only given as a personal compliment when he returned first from his travels, and therefore could never exoner the sub-factors, who had never yet compted, either to the principal chamberlain or himself; the Lords ordained him to compt. Fount. 31. July 1638, Queensberry.

A DISCHARGE granted to a cautioner, upon payment, was not found competent to be pled upon by the principal debtor, unless the cautioner did concur. Gosh. 8. Stair, 13. July 1675, Scrimzeour. Here the discharge was not absolute of the debt itself, but simply of the cautioner's obligation, being *concepta in personam fide jussoris*.

A PARTY, who had served several years for the shire, as their commissioner to the parliament, having wrote to one of the heritors, thus, "I confess, Sir, I had
" never occasion to do you any act of
" kindness, but, I hope, I have served the shire faithfully, and burdened them with no expences, and I
" fully discharge you of any expences upon the account of my representing the shire." The Lords found, That this letter did import a full discharge and exoneration to the whole heritors of the shire, as well as to him to whom the letter was addressed, of all commission-fces, preceding the date of the letter. Forb. 18. June 1713, Burnet.

DISCLAMATION.

A SUPERIOR, suing for production of the vassal's evidents and holdings, need not affirm him to be his vassal

vassal before production; but the vassal must either produce or disclaim. Colv. Feb. 1582.—Found, that a party, who pretends to the superiority of lands, and sues another as his vassal, for producing his holding, must first produce his own sasine of those lands, before the defender be compelled either to produce or disclaim. Had.

Dalziel.—There can be no hazard of disclamation, where the superior is a singular successor, not formerly acknowledged by the vassal. Stair, 18. Jan. 1681, Queensberry.

FOUND, That the vassal, whose liferent, or other casualty, had fallen in the superior's hands, could not disclaim him after the casualty had fallen, disclamation being introduced in favor of superiors. Auchin. (Vassal) Dur. Spot. (Disclamation) 26. March 1628, Douglas.

DISCUSSION.

And first, Discussion of Heirs.

THE heir of tailzie cannot be sued till the heir-male of blood be discussed, the oppo-

ner condescending that there are lands, *Who have the teinds, or annualrents, to which the benefit of dis-*

heir-male may succeed. Hope, (Heir) *discussion* 22. June 1621, Dunbar.—The heir of line must be discussed before the heir of conquest. Auchin. (Air) 12. Feb. 1630, Creditors of Fairly.—The heir of line, as creditor to the deceased, may insist directly against the heir of conquest, provided he himself renounce to be heir. Dur. 21. July 1630, Fairly.

—An apparent heir-male, passing by his immediate predecessor, who had been three years in possession of the estate without infestment, and serving heir to a remoter last infest; the Lords found, That he cannot be sued upon the act of parliament 1695, to pay the immediate predecessor's debt, till after the heir of line be first discussed. Forb. 13. Nov. 1712, Vint.—A father, taking a bond to himself, being in life, and to his second son, failing himself by decease; the father's creditors contending, That the son, as heir of provision to that sum, was liable to them at least *in valorem*; the Lords

affoizied the defender, and found him not liable, the deceased having both heirs and executors. Fount. 10. Feb. 1700, Walls, &c.

FOUND, in consequence of an act of sederunt, That

No benefit of discussion between heir and executor. heritable bonds may not be sued against an executor, nor a moveable bond against an heir. Hope, (*Executor*) Meldrum.—A man being bound to insert in an annualrent, and, at his

decease, not being of that estate that he can have an heir, the party was found to have action against his executors, altho' the bond was heritable, and only proper against an heir, if any was. Had. 14. Dec. 1609, Gray. Had. 16. Jan. 1610, Spence.—An obligation heritable being transferred, after the debtor's decease, against his executors, or the intromitters with his goods and gear, will only have execution against them for the annualrent resting owing before the deceased's death, but not for the principal sum or annualrents for years after his death, this being only competent against his heir, or apparent heir, intromitting with his goods and gear, unless the heir, being first discussed, be found not *solvendo*. Had. 24. May 1610, Hill.—Found, that not only an heir, but even an executor, may be compelled to lay money upon land, in implement of a contract of marriage between the deceased and his relict. Hope, (*Executor*) 17. Had. 18. Jan. 1611, Trail.—A creditor may, at his option, sue either the heir or executor, altho' the bond be heritable, because the heritable clause is understood to be inserted in favor of the creditor, and therefore should not prejudice him. Hope, (*Executor*) 18. Nov. 1626, Adams. Spot. (*Creditor*) Dur. 24. Feb. 1627, Carnegie.—An executor being sued upon a minute of sale, was found liable to pay the price, tho' the bargain stood unimplemented *in nudis finibus contractus*, reserving action against the heir as accords. Stair, 1. July 1662, Baillie.

Heir renouncing, has no interest to plead this privilege.

THE heir of entail renouncing, can have no interest to plead the benefit of discussion. Dur. 20. Nov. 1638, Provost of Stirling.

AN heir-male being sued for payment

ment of his predecessor's debt; the Lords found no process, in regard the heir of line was not called, and repelled the answer, That the heir of line had no visible estate, which supercedes the necessity of discussing the heir of line, but not of calling him. Stair, 24. Jan. 1672, Lufs.—But, thereafter, the Lords repelled the plea of no process, unless the heir-male would condescend upon some estate belonging to the heir of line. Bruce, 25. Jan. 1715, Allan.

In a process, against an heir-male, the Lords found no necessity to discuss the heir of line, unless he had a visible estate that could be affected. Gilms. Feb. 1662, Floyd.

ONE having bound himself and his heirs-male; the heir-male was found liable *primo loco*, and the heirs of line *secundo loco*. Stair, 18. Feb. 1663, Blair.—In a process, against an heir of entail, for payment of the predecessor's debt, the defender pled, That he could not be liable till the heirs of line were first discussed. Answered, No necessity of discussion, unless an estate could be condescended on to which the heirs of line may succeed; and here the heir of entail is expressly burdened with all the predecessor's debts, and consequently is bound to relieve the heirs of line. Replied, The heirs of line are impugning the tailzie, and it would be hard to make the defender pay the debt, while he is not secure of the subject. The Lords found the heirs of line sufficiently discussed, by obtaining a decree against them upon a renunciation to be heir. Fount. 11. Jan. 1698, Colquhoun.

AN heir-male, who is obliged to relieve the heirs of line, has not the benefit of discussion. Stair, 22. Nov. 1665, Scot.—In a like case, it was not sustained as a good answer to the exception founded upon the benefit of discussion, That the heir-male, defender, had granted an obligation to the heir

If an heir-male can, in any case, be sued without calling the heir of line?

No necessity of discussion, unless there be a visible estate.

Where the heir-male is bound primarily.

Or bound to relieve the heir of line.

of line, to relieve her of the very debt sued on. Dair. 16. June 1715, Wightman.

THO' an heir of conquest, or tailzie, must first be discussed, with respect to debts affecting the conquest or tailzied lands; yet if the debt exceed the worth thereof, the heir-general must first be discussed *pro reliquo*, before the others be bound to answer. Had, 18. June 1607, Kinghorn. — Burdens lying upon tailzied lands, and bonds to infest men in the property thereof, or annualrents forth thereof, should be borne by the heir of tailzie succeeding to these lands. Had. 19. Feb. 1611, Fairlie. — The Lords found an execution proper against one who was heir of conquest, without discussing the heir of line, because the contract, sued on, was made touching the lands that belonged to the heir of conquest. Hope, (*Heir*) 23. June 1615, Gordon.

A DECEASED's creditor having discussed the heir-general to the length of horning, he is not obliged to comprise the lands, but may next insist against the executors, or heir of tailzie or provision. Had. Nov. 1608, Home. — Putting the heir of line to the horn, is not a sufficient discussion: but his right ought to be discussed by comprising or adjudication, or his person by caption, he not having renounced to be heir. Dur. Spot. (*Horning*) 22. March 1627, Edgar. — A creditor having led an apprising against the heir of line, and offering to dispoise the same to the heir of provision; this was not found a sufficient discussion to give him access against the heirs of provision, since he did not put the same to execution. Stair, 29. Jan. 1679, Torphichen.

AN heir of line having renounced, the Lords found, That the heir of tailzie might be sued, without first adjudging the *hereditas jacens*, and that there was no need of further discussing: only they ordained the creditor to make assignation of his right to the heir of tailzie, that he might crave adjudication for his relief, of the right pertaining to the deceased, whereunto the heir of line might

might have succeeded. Auth. (*Air*) 25. June 1629, Auchterlony. The like; Stair, 22. June 1678, Crawford. — The contrary had been found. Dur. 26. Jan. 1622, Cowan. Dirk. 18. Dec. 1666, — The Lords found it not necessary to discuss a present heir of line before the heir-male, and of tailzie, where the former heir of line renounced, and an adjudication was led upon the renunciation, unless some estate belonging to the deceased was omitted out of the adjudication. Forb. 23. July 1708, Staiton.

Discussion of principal Debtors.

THE tutor-dative of an idiot, having confirmed himself executor to a deceased brother, bound himself cautioner in the confirmed testament, and uplifted some money belonging to the said brother; and, thereafter, being removed by sentence of the Lords, and another nearest in blood put in his place, a sister, who stood in the same degree of relation to the deceased, suing him, as intermitter, for her half; the Lords found, That the idiot, principal executor, was liable, in the first place, to the pursuer, and that the defender could only be sued *tutorio nomine*, or as cautioner for the executor; and found, That he cannot be liable *tutorio nomine*; now after he is exaucterated, unless he has the idiot's effects in his hands, nor as cautioner, till the idiot and his present tutor be discussed. Forb. 14. Fount. 15. Dec. 1711, Swinton, &c.

FOUND, That cautioners for common factors (which caution they find to the royal-burghs) cannot be distressed, till the factor be first discussed, either before the conservator, if there be factors in the Netherlands, or before the Lords, if here. Auth. (*Factor*) 23. Feb. 1636, Richie. — In a suit against a cautioner, for a collector of a town stent the Lords sustained the defence, That the principal was not called, tho' he was known to be bankrupt, seeing cautioners for acts of administration, such as for tutors.

and curators, &c. have *beneficium ordinis et discussionis*. Fount. 13. Nov. 1677, Sandilands.

THE Lords found, That a cautioner in an indenture, taking burden upon him for the apprentice, who was minor, had not the *beneficium ordinis*, in a suit for the penalty incurred, by the apprentice's deserting his master's service, and that he might be insisted against, without discussing the principal. Forb. 11. Feb. 1708, Balfour.

—A cautioner, being bound as surety and full debtor, tho' not conjunctly and severally, was found not to have the benefit of discussion. Gilin. July 1665, Dunbar. Forb. 18. June 1713, Montgomery. A third party having granted an obligation to the creditor, to cause the debtor pay, or else to pay the debt himself; tho' he was only found to be a cautioner, yet he was refused the benefit of discussion: only he was allowed a diligence to call the debtor into the process, in case he had any defences against the debt. Fount. 20. Jan. 1693, Doul.

THE Lords found a cautioner in a suspension, only *subsidiarie* liable, altho' the principal *cautioner* was already so far discussed, that a *suspension* of decree of suspension was extracted against him. Fount. 27. Feb. 1702, Houston. — But the contrary was thereafter found, viz. That a cautioner in a suspension, after the letters are found orderly proceeded, may be charged summarily upon the bond of cautionry, without first discussing the principal debtor. Dalr. Forb. 17. June 1714, Forbes.

A CREDITOR can have no action against a cautioner in a confirmed testament, till he discuss the executors, and it is not sufficient discussion to put them to the horn; he must also point, and, failing moveables, go on to apprise. Dur. Had.

12. Feb. 1623, Arnot. The like; Hope (*Executor*) 10. Dec. 1623, Stewart. — A decree against a principal, is no sufficient discussion, so as to come at the cautioner, but there must be at least a registered horning. Stair, 24. July 1662, Brisbane. — He who has a decree against an executor, discusses him sufficiently by horning, and needs

DIVISION. DIVORCE. 427

needs no further diligence before he have recourse to the cautioner. Had. 27. June 1610, Scrogie.—The cautioner for a messenger being liable only *subsidiarie*, after the messenger is discussed, it was alledged, That the personal discussion, by a registred horning, is not enough; the Lords found, That the defender, being cautioner, condescending on goods or lands belonging to the messenger, and giving his oath of calumny on the condescendence, the pursuer ought to discuss the same by poinding or apprising. *Harc. (Cautioners) 15. Jan. 1685, Miln.*

THE principal debtor being abroad, the cautioner may be immediatly sued, without having the benefit of discussion. *Fac. Later decision. Col. vol. II. p. 110. Elams, 7. Dec. 1757.*

DISCUSSION of heirs portioners. See *Solidum et præ rata.*

IF a debtor, who has the benefit of discussion, may be sued in the same process with the principals. See *Legal Diligence.*

DIVISION.

IN a process of division, at the instance of Sir John Hall of Dunglass, against Alison Callender, the Lords found, That small parcels of land, surrounded by a greater estate, and lying at a distance from one another, but each parcel lying contigue, and not run-rig, did not fall under the act for dividing of lands lying run-rig. *Falc. vol. I. p. 21. Hall, 7. Dec. 1744.*

DIVORCE.

A PROOF was allowed to a wife, against whom a divorce was sued, of her husband's lenociny, tho' it was alledged he had exposed her for money, or to the persons with whom she was accused, or had explicitly consented, but upon a condescendence of his having used indecencies towards her in public, and of his maltreating, and then leaving her in company, in such a manner as tended to debauch her. *Falc. vol. I. p. 88. M'Kenzie 28. Feb. 1745.*

DONATIO

DONATIO MORTIS CAUSA.

Deed in contemplation of death, the grantor being to travel.

A MISSIVE letter, written by a deceased to his spouse, and bearing, That if he happen to die before his return, she should do with what he had as she pleased, was found to be only *donatio mortis causa*, or legacy, which could only affect dead's part. Stair,

25. July 1663, Nasmith.—In a competition among creditors on an estate, the Lords preferred a liferent, granted by a man to his spouse, tho' it was objected, That it seemed to be only *donatio mortis causa*, because it mentioned in the narrative, that he was going abroad, and might die before he returned home, and so was *contemplatione mortis*, and null, because he returned: But this the Lords repelled. Fount. 16. Feb. 1686. Creditors of Connochie.—A gentleman going abroad, tailzied his estate to a cousin; and failing him to his brother, narrating, That he desired to avoid differences, in case of his not return, reserving power to alter, and dispensing with not delivery, &c. Before his return, the first substitute having deceased, and he himself returning, and deceasing thereafter, the second member of the tailzie entered heir upon the said disposition: and another cousin raising a reduction of the disposition, as a *donatio mortis causa*, it was found, That the tailzie was still obligatory, and, that it did not become void by the return of the granter, &c. Fount. 17. Feb. 1699, Leslie, &c.

BOND, being granted by a man to his brother, containing a disposition to certain goods, with provision, that they should not be delivered till after his decease, and that of his daughter; and she dying unmarried, after the decease of both, the assignee insisting for delivery of the goods, this was found not to be a *donatio mortis causa*, and therefore, not revoked by the donor's living seven years thereafter. Dur. 8. March 1626, Traquair, &c.—A bond, granted to a niece, payable after the granter's death, in case he left no heirs of his

Bond payable after death, in case the granter die without heirs of his body.

his own body, delivered in *liege poussie*, was found not revocable, not being *donatio mortis causa*. Stair, 8 Dec. 1675, Thomsons.—One having disposed, “the whole sums and goods he should have at his death to his brother, if he survive him, and the disponent have no children of his own;” this was not found revocable as a *donatio mortis causa*. Stair, 10 Jan. 1679, Grant.

A CONTRACT, between a father and his daughter, wherein he was provided to 300 merks, to be paid out of the readiest goods and gear pertaining to his daughter at her decease, and which he accepted in full satisfaction of all that might then fall to him, was found a *donatio mortis causa*, and alterable by the daughter at pleasure, in respect the father had no antecedent claim against his daughter; and therefore the contract was interpreted, to be of the nature of a destination of succession. Dur. 18. March 1636, Bells.

AN assignation being simply granted, and without any clog, but the assignee granting back-bond to compt and pay to the cedent, at his coming home from abroad, this was found to be no *donatio mortis causa*, nor revocable, by a posterior assignation, granted abroad, the cedent never having returned home. Dur. 15. Feb. 1637, Lauder.—A man who had considerable means with his wife, having, at her desire, granted bond to her sister, for a sum payable at the wife's death, but with a faculty to the wife, to alter or revoke, in case of ingratitude, &c. and she having accordingly revoked it by a writ under her hand, and given it to others, but without expressing any particular act of ingratitude moving her to alter; the Lords found, That the granter must condescend on, and prove some act of ingratitude or provocation, otherwise they would not sustain her revocation. Fount. 22. Jan. 1709, Muir.

Condition of avoidance expressed, no place for avoidance, as *donatio mortis causa*.

A BOND being granted by a man to a lawyer, bearing, That it was for pains taken by him in his affairs, and because he had disbursed some charges

Bond granted for an onerous cause.

in

430 DONATION, &c. DOVECOT.

in doing thereof, and therefore binding him to pay the said lawyer a sum, at the term after the granter's own decease, if before his said decease, he did no other deed derogatory to the said bond, and also, if he died, having no heirs-male of his own body; this bond was found not to be *donatio mortis causa*, being granted for onerous causes, and so not revocable nor alterable. Dur. 2. March 1624, Curriehill.

A MISSIVE, of the following tenor: "I give you
" my watch, chain, and seal, which
Later decision. " you shall enjoy after my death,"
was found to constitute a *donatio mortis causa*. Home, p. 338. Whyteford, Nov. 3, 1742.

Donation between Husband and Wife.

MONEY given to a lady, on such occasions as setting of tacks, was found, after the husband's death, to belong to her, as donations unrevoked. Pale. vol. II. P. 224. Douglas, Jan. 25. 1751.

DOVECOT.

A DECREE being obtained for demolishing a dovecot upon a new foundation, because the builder had not ten chalders of victual, conform to the act of parliament; the Lords found, That the party was not obliged to demolish the dovecot, seeing the house might be employed to some other use, but decreed the defender to build up the head of the dovecot, so as doves could not enter, and continue it so, till he acquired an estate conform to the act of parliament. Here the dovecot-house did not consist of a few holes, which are usual upon the top of another house, but contained five or six hundred holes. Harc. (*Decrees*) Nov. 1682, Durie.
—By act 19. parl. 1617, it is ordained, "That none
" thereafter shall have the privilege to build a dovecot, unless he has ten chalders of victual." But if one purchase land, with a dovecot, from an heritor who had the privilege of a dovecot, he may enjoy the same privilege, tho' he be not possessed of ten chalders of victual.

victual. And it was found, That if there was a dovecot, at the time of the purchase, the purchaser may repair, or rebuild it upon the same foundation, but with no more dovecot holes than the former had; but if it was ruinous, at the time of the purchase, he cannot rebuild it.

19. Jan. 1731, Kinloch.

A PERSON having more than ten chalders of yearly rent, is not restrained by act 19. parl.

22. James VI. from erecting more *Later decision,* than one dovecot. Fac. Col. vol. I.

p. 41. Brodie, 3. July 1752.

EDINBURGH.

EDINBURGH is only *communis patria*, to those who are out of the country. Rem. Dec. p. 70. Cochran, July 1743.

THE act 1698, regulating the manner of buildings in Edinburgh, is still in force. Fac. Col. vol. II. p. 447. Buchan, 5. August 1760.

EJECTION.

THE entry in *vacuam possessionem*,

without violence, and finding no interruption, may be sustained to infer the defender's intrusion to repossess

Entry in vacuam possessionem.

the pursuer, but not to infer ejection,

to make the enterer liable to violent profits. Colv.

Jan. 1588, Moncur. Had. 18. Jan. 1623, Drumkilbo.

EJECTION was sustained, altho' there was no violence done to the pursuer's person or family, but only the house blocked up, and sustenance for man or beast stopped from coming in to him, so that he at length left the house. Colv. 3.

What acts of violence will infer ejection?

June 1575, Colliestoun.

IT was found, That no person had interest to sue an ejection, but the actual and natural possessors of the land; and that a party could not sue the same for the deed done to his tenants, but that it was

Who have interest to sue?

competent

competent to the master, for ejecting his servants, hind's and cottars, because the master, by them, had natural possession, but not by the possession of his tenants. Dur. 26. Nov. 1628, Bruce. — A tenant being ejected, the Lords sustained the ejection at the master's instance, tho' the tenant did not concur, but they refused to sustain it, *quoad omnes effectus, viz.* as to violent profits, *jura-mentum in litem*, but only that the master should be in the same condition he was in before the ejection, and should have the same manner of possession as if the land were not void, and to uplift the duties, and to put in, and remove tenants, and for the bygone ordinary duties. Dirl. 18. July 1666, Steel.

A PARTY, tho' not present at the deed of ejection and spoliation, and a long time there-
Against whom after absent, was nevertheless found
the action lies. guilty of the saids deeds, by ratificati-
 on thereof, which ratification was also
 inferred by the person's coming to the house whence the
 pursuer was ejected, and continuing to reside there
 with her sons, who had committed the ejection. Colv.

May 1581, Anderson.

IN an action of ejection, the Lords found, That the
 pursuer ought to libel possession with
What title some title, otherwise, they found the
necessary? libel not relevant. Balf. (Libel) 2.
 Colv. 22. March 1573, Wishart. —

Process of ejection was sustained at the instance of a
 tacksmen's relict, who had no title in her own person
 to produce, the tack having been only during life; and
 this, because she had continued in possession three months
 after her husband's decease, and before the ejection.
 Spot. (Ejection) Colv. May 1583, Fraser.

ENEMIES EFFECTS.

THE valuable effects of enemies, do not belong to
 the seizers, but the custody of them to the judge,
 in whose territory they are found. Falc. vol. II. p. 241.
 Panmuir, 19. Feb. 1751.

ESCHEAT.

ESCHEAT.

IN a special declarator of escheat, the horning was alledged to be null, as being upon a null decree, and falling therewith in consequence; this was repelled, because the party was in contempt, in not suspending *debita tempore*. Stair, 10. Feb. 1663, Montgomery. *May fall upon a null horning.*

THE donatar subjected to the debt in the horning, upon which the gift was taken, altho' he neither intromit, nor intent declarator, unless he renounce his gift, *rebut* *Donatar liable for the debt in the horning.* *integris*. Had. 9. Feb. 1603, Stalker.

Feb. 1598, Elphinston.—But if he once begin to intromit, he is not allowed thereafter to renounce. Had. 1. Jan. 1593, Finlayson. Dur. 15. March 1631, Fletcher.—Nor after, will he be allowed to defend himself against payment, by pleading the nullity of the horning, and that therefore he lies open to be called to accompt by the rebel for his intromissions, *Ibid.*—But the donatar was not found liable for annualrent, that became due upon denunciation, seeing the same is not specified in the act of parliament. *Ibid.*

BONDS, bearing annualrent, are moveable, before the term of paying annualrent, and fall under single escheat. Stair, 26. Gosh. *What falls under single, and what under life-rent escheat?* 27. June 1668, Dick.—A sum due by bond, bearing an obligation to interest, was found moveable after requisition, and to fall under single escheat, *Ibid.* *Bonds.* tho' it continued to bear annualrent, because requisition made a sum moveable before the act of parliament 1661. Dirl. Gosh. 12. Jan. 1677, Jeffray.—An heritable bond, on which interestment has not followed, falls under single escheat. Dur. 22. March 1634, Ochiltree.—The contrary; Dur. 1. July 1626, Halyburton.

THE sub-vassals life-rent-escheat, falling to the vassal, is carried as a part of the vassal's single escheat, when the vassal afterwards becomes rebel; but the vassal's life-rent-escheat falling, the donatar thereof is entitled to the life-rent-escheat of the *2do, Rights having tractum temporis.*

sub-vassal falling thereafter; so that the sub-vassal's life-rent-*escheat* first falling, makes a part of the casualty of the vassal's single *escheat*; but falling after the vassal's life-rent-*escheat*, makes a part of the casualty of life-rent-*escheat*. Dur. 26. Feb. 1623, Sibbald. Dur. Spot. (*Escheat*) Auch. (*Vassal*) 8. March 1628, Douglas. Dur. 24. Spot. (*Escheat*) 26. July 1632, Rule.—A tack, to one, and, after his decease, to his heir, for each of their lifetimes, and after that for 19 years, having fallen to the king by the forfeiture of the first tacksmen, and being gifted, the said tack was found in the person of the donatar, to fall under his single *escheat*; tho', in the person of the tacksmen, it would have fallen under his life-rent-*escheat*; by 15. act, parl. 1617; and it was found, That the heir to the donatar of the forfeiture, had no right thereto, but lost it totally by his predecessor's rebellion. Dur. 10. March 1631, Stewart.

A ROOM, having continued several years in the natural possession of the proprietor, after the rebellion, where his life-rent-*escheat* had fallen, the Lords found, That the superior had only right to as many of the farms of the rebellion, as he had several years past, since the rebel was outlawed, year and day at the horn, as the land was worth, and in use before to pay of rent; and that the king's donatar to the single *escheat*, had right to the rest of the crop and increase for each year, deducting the expences of labouring, &c. Dur. 23. March 1630, Murray.

IT was found, That a bond of re-
lief, not being liquid, falls not under
life-rent-*escheat*, unless there had been a dis-
charge single or life-rent-*escheat* prior to the denunciation, by
which the relief would have effect.
Fount. 27. Jan. 1635.

ACTIONS, for annulling of feus, for not payment of
the feu-duty, are not competent to be
pursued by the donatar to the superi-
or's life-rent, whose right, being tem-
porary, cannot produce such actions a-
gainst the vassal to take away his property; neither
was it regarded, that the donatar restricted the sen-
tence to have effect only during the vassal's life, seeing the

the feu could not fall for that space, and thereafter revive again. Dur. 4. Feb. 1634, Wedderburn.

A MAN committing slaughter within burgh, and being convict, it was found, That his escheat belonged to the burgh, but if the party was fugitive, and denounced for not-compearance, that the escheat belongs to the king; because, in this case, the escheat falls not for a crime committed within burgh, but for non-compearance. Bal. (*Burghs*) 28. May 1542, Ormiston.

THE single escheat of a minister falls to the king, and not to the lord of regality, tho' the manse be locally within the regality; for manses, being given by the king and parliament, are not reputed to be of any private holding, and acknowledge no superior but the king. Dur. 28. March 1628, Fletcher.—The escheat of a rebel living within a regality, falls to the lord of regality, and reaches his moveables wherever situated. Stair, 26. June 1680, Young. The like; tho' the denunciation was executed at the head-burgh of the shire. Stair, 19. June 1674 Murray.

THE husband's *jus mariti* of lands, belonging to his wife, which falls under single escheat, belongs not to the wife's superior by his rebellion, but to the king. Dur. 24. Feb. 1629, Pollock.—The contrary had been found; Had. 23. Feb. 1609, Bearford.

THE liferent-escheat of a subject, whereon infestment had not past, was found to fall to the king, because liferent-escheat falls always to the king, where there is no superior, and there cannot be a superior without infestment. Stair, 22. July 1675, Menzies.—The like; Dur. 9. March 1624, Douglas.—For this reason; a liferent-tack, which falls under liferent, and not single escheat, goes to the king by escheat, and not to the setter. Had. Feb. 1598, Leslie.

THE office of a sheriff-clerk falls in the king's hands by his rebellion. Hope, (*Horning*) 27. July 1615, Kinross.

THE liferent-efcheat of an apparent heir, the predecessor having died infest in the lands, falls to the superior of the lands. Had.
 310, *Liferent-efcheat of an apparent heir.* 20. Dec. 1622, Hamilton. Dur. 21. March 1623, Cunningham. Dur. 3. July 1624, Muir.

THE liferent-efcheat of a Lady tercer, belongs to the superior by her rebellion, altho' she had the terce only by consent of parties, and was never served, nor kenne'd to any terce. Hope, (*Horning*). 12. July 1622, Maxwell, &c.

THE gift of efcheat is equivalent to an assignation, wherof general declarator is the intimation, and therefore, in competition with arrestments, the donatar or arrestor is preferred, according as the general declarator or arrestment is prior in time, provided always the arrestment be upon a debt prior to the rebellion. Had. 7. Feb. 1611, Tenants of Kirkcuba. Dur. 22. Feb. 1628, Anderson. Dur. 19. June 1630, Nisbet. Dur. 24. Feb. 1637, Bilmuir. Stair, 19. Feb. 1667, Glen. Stair, Gosf. 25. Nov. 1671, Chalmers. Forb. 17. March 1707, Henderson.—One having arrested a sum due to the rebel, and the donatary to the efcheat being paid his debt; but he that was second in the back-bond, craving to be preferred to the arrestor, as being *in eodem corpore*; the Lords found, That he ought to be preferred. Fount. 17. Nov. 1686. —A donatary of efcheat, declared in general, was, by the Lords, preferred to one arresting after the gift, and before declarator, for a debt due before the rebellion; upon this speciality, That the donatary's gift proceeded upon his own horning, and he obtained declarator before the arrestor recovered a decree of forthcoming. Forb. 24. Jan. 1712, Brskine. The like; Dur. Had. penult. Feb. 1623, Halybuntou.

GENERAL declarator is the intimation of the donatar's right: and therefore, in competition between a gift of single efcheat, and an assignation granted before rebellion, the right first intimated will be preferred. Mair. 13. July 1566, Stewart. Hope, (*Assignation*)

(Affignation) 11. Feb. 1614, Clark. Dur. 12. Feb. 1642, Molman. Stair, 9. July 1662, Bones.

A CREDITOR, confirming himself executor-dative to his debtor, and then obtaining both sentence and payment from the deceased's debtors; in a special declarator, sued by the donatar to the said deceased's escheat, the gift being posterior to the other party's sentence and recovery of payment; the Lords ordained the goods to be divided *pro rata*, (the donatar being also a creditor) in respect the executor-creditor had got payment; so that they thought it hard to make him restore all. Auch. (Escheat). 18. March 1628, Leyes.—The Lords preferred an executor-creditor before a donatary of the deceased's escheat, the confirmation being before the gift, and a decree against the deceased's debtors obtained before the decree of declarator of the gift. Home, Dec. 1684, M'Raith. The like; Fald. 6. Nov. 1685, Polwarth.—A donatary of a deceased's escheat, having first procured his gift, (being a creditor) and several months thereafter another creditor confirming, before intending declarator on the escheat; the Lords preferred the executor-creditor before the donatary. Forb. 8. Fount. 10. Nov. 1710, Arbuthnot.

THE rule, "That creditors doing diligence before declarator, are preferable to the donatary of single escheat," holds, by our practice, in moveables only, or moveable sums pointed or made forth-coming upon arrelements; but not in rights having *tractum futuri temporis*, which cannot be taken away from the donatar by any diligence posterior to the denunciation. Upon this footing, a donatar of single escheat was preferred to an appriser of a husband's *jus mariti*, the apprising being after the rebellion, tho' prior both to the gift and declarator. Stair, Gouf. 128. July 1668, Dumfries. The like; Hope, (Hornig and Escheat). 6. July 1622, Murray.

SINGLE escheat is a casualty that imports a conveyance of the rebel's goods, which, like any other acquisition, must be completed by laying hold of the subject; and therefore, a general declaration

With an executor-creditor.

With an apprising.

Competition, different escheat with creditors.

ima, *Lapsa* rator is necessary, which answers to
of year and the intimation of an assignation. The
day establishes same, by analogy, may be thought to
the right. hold, where the liferent escheat falls to

the king, of subjects upon which infest-
 ment has not past: but the liferent-escheat, which is a
 casualty of superiority, *nihil novi juris tribuit*: the in-
 ferior enjoys the rents of his vassal's lands, not as deriv-
 ing any right, or succeeding to him, but in virtue of
 his own radical right and infestment, as in the case of
 wards the vassal, by his annual rebellion, being barred
 for life from insinuing upon his property, or claiming the
 mails and duties. Hence, after elapse of year and
 day, the real right must be understood to be established
 in the superior's person, as fully and equally as if he
 was infest upon a right derived from his vassal. But
 during the currency of the year and day, as the vassal
 has not yet incurred the penalty, nor the casualty taken
 place, having that time indulged him to satisfy the
 charge, every right granted by him before rebellion,
 and completed within the year, will be preferred to the
 donator of liferent-escheat. Dur. 5. Hope, (*Horning*)
 6. July 1622, Murray. Dur. 24. July 1632, Rule.
 Dur. 3. Dec. 1623, Harris. Dur. Spot. (*Liferent Es-*
cheat) 16. Feb. 1631, Cranston. Dur. 3. Dec. 1634,
 Lindsay. Stair, 23. Feb. 1671, Lord Justice Clerk.
 Stair, 19. Jan. 1672, Beaton. Cons. 15. July 1673,
 Savage. Fount. Forb. 28. Nov. 1720, Creditors of
 Spot.—Yet several other decisions have gone upon the
 footing, as if declarator was necessary to complete
 the gift of liferent-escheat, the same way as in a gift of
 single escheat. Thus, a comprising led after the lapse
 of year and day, with infestment upon it, was prefer-
 red to a posterior gift. Hope, (*Horning*) 9. March
 1615, M'Math. The like; Dur. 8. Feb. 1642, Wad-
 del.—And a creditor of a vassal, having arrested after
 year and day, and obtained decree of forthcoming, be-
 fore gift or declarator of the liferent-escheat, was pre-
 ferred to the superior's donator, because of his diligence.
 Dur. 19. June 1630, Nisbet.

2do, *With*
bare infestment.

THE Lords found, That the right
 of donatory to a rebel's liferent-escheat,
 was preferable to that of a bare infest-
 ment,

ment, granted prior to the denunciation, unless either confirmed or clothed with possession before the annual rebellion existed; tho' it was pled, That a base infestment is a real right without possession; and that altho', by the act 1540, C. 105, a posterior public infestment for causes onerous, is preferable, this cannot be extended to a right of liferent-escheat: it being answered, That the superior claims the mails and duties in virtue of his own radical right to the lands, which radical right revives upon the vassal's forfeiture of his liferent; and therefore, the superior is in a case as strong as any purchaser can be. Dur. 19. March 1633, Renton. Stair, 21. Feb. 1667, Miln. Fount. 6, Dec. 1699, Creditors of Clark.

A PARTY's annual rebellion, not being wholly run, after he was apparent heir by his father's decease, but most of it being run in his father's life, and before year and day expired after his father's decease, the creditors having adjudged, and charged the superior: In a competition between one of them, as donatory to the escheat, and the other creditors: the Lords found, That these strict casualties are not to be extended, and therefore, that the escheat could not take place in this case, and so preferred the other creditors. Fount. 20. July 1697, Creditors of Muirhouse.

LIFERENT-escheat is burdened with apprisings led upon debts existing before rebellion, and completed by infestment within the year and day. Dirk 26. July 1673, Annandale. Or by presenting a signature to the exchequer, where the apprising is led against the king's vassal, because the king cannot be charged. Stair, 27. July 1673, *inter eosd.*

—But thereafter, the Lords, before answer, appointed trial to be taken *par membra curie*, at what time the signature was presented, and what was the cause of the delay, that infestment was not expedited within year and day. Stair, 25. July 1676, *inter eosd.*

A PUR.

A PURCHASER, who got procuratory and precept, having infest himself base, his liferent-
Liferent-escheat once de- volved, will stand good against every posterior right. escheat was found to fall to the disposer, and found not evacuated by the rebel's obtaining a public investment upon resignation, seeing the same was obtained after the running of year and day, and after declarator at the donatar's instance. Dur. 23. Jan. 1624.

Donatar of Meldrum's liferent-escheat. — Liferent-escheat of a vassal once fallen, will stand good to the superior, tho' the vassal afterwards lose his tailzied fee, by incurring an irritancy. Home, 18. July 1722, Scot.

VOLUNTARY right granted by the rebel after denunciation. See Litigious.

COMPETITION between a donatar of single escheat, and porteur of a bill. See Bill of exchange.

WHAT is carried by a gift of escheat. See Gift.

GIFT of escheat, when presumed simulate? See Presumption.

IS simulation good against onerous purchasers? See Personal and real.

EXCHEQUER.

THE Exchequer being settled by act of parl. 1645, with power to expedite new gifts, and having gifted a patronage, without warrant from the king, and the rights of private persons being saved by the act rescissory of the acts of this parliament, the gift was not found good; Falc. vol. II. p. 263. Lockhart's, 10. July 1751.

JURISDICTION of the Court of Exchequer, with respect to the common good of burghs. Rem. Dea p. 186.

EXCAMBION.

IT was found, That where parties excamb lands, the lands remain really affected to return to the party from whom the exchanged lands are evicted, conform

EXECUTION.

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to the proportion of the eviction, in which the party distressed hath recourse to his own lands *pro tanto*, in which recourse, the Lords found him preferable to all other persons who had acquired any real rights to the lands, tho' these rights preceded the eviction; and this, because contracts of excambion are of themselves real. Dur. 25. Nov. 1623, Melrose.—In an excambion of lands, tho' regress upon eviction was stipulated to the granter only and his heirs, yet the lands being evicted from a singular successor, he was found to have regress against the excambied lands, tho' the stipulation was not in his favor, *quis inerat de natura rei*. Dur. 14. July 1629, Wards.

IN excambion of lands, the party from whom the eviction is made hath his option, either to seek regress or damages. Nicolson, (*Eviction*) 6. July 1622, Home.

EXECUTION.

Warrant of Execution.

A WARRANT to cite at the nearest market-cross, where there is no *Warrant, how* *tatus accessus* to the party, ought not *obtained?* to be granted of course upon common bills, but by the Lords *in presentia* upon special bills. Stair, 29. June 1666, M'Pherson.

AN inhibition was found null, because served at another church than the parish-church designed in the body of the letters, altho' *Execution not* it was offered to be proved, that the *conform to the* said parish-church was ruinous, and *warrant.*

that the whole congregation went to the neighbouring church. Had. March 1604, Moncur.—The Lords found an inhibition null, because the letters gave warrant to charge the party then out of the country, upon 60 days, at the market-cross of Edinburgh, pier and shore of Leith, and at the cross of the head-burgh of the shire where the lands lay, but contained no further warrant, and yet the execution bore personally apprehended, for doing whereof there was no warrant in the letters, altho', by this personal execution

cution, the pursuer had done more than was contained in the warrant of the letters. Dur. Hope, (*Inhibition*) 24. Jan. 1627, Erskine. Dur. Hope, (*Inhibition*) 19. March 1628, Lamb.—Yet such an execution was sustained, being of a summons. Dur. Auch. (*Summons*) 2. Feb. 1628, Kirkconnel.—And a party was held confessed upon a personal citation, tho' there was only warrant for an edictal citation, because a warrant for an edictal citation includes a personal citation. Forb. 12. June 1705, Cochran.—An incident used by a defender against a party, called as haver, and out of the country, upon 60 days, was not sustained, because the letters bore no warrant to summon him as out of the country. Dur. ult. Feb. 1629, Muir.—The Lords found, that a party, being within the country at the time of the citation upon the first summons, (second summonses not being then taken away, nor for sometime thereafter) and going out of the country before the second, could not be cited at the pier and shore of Leith upon the second, without a warrant in the second summons. Dirl. 21. June 1672, Ferguson.

IT being objected, That a messenger, at delivering the copy, wanted the summons, which
If the messenger must show his warrant. was the warrant thereof, and being required then by the defender's advocate to show it; the Lords found a messenger not obliged to show his warrant to third parties, not defenders, and that law presumes he had it on him, unless the contrary was proved. Fount. 11. July 1679, Lermouth.

EXECUTION of letters of intimation at the market-cross of Edinburgh, pier and shore of Leith, not bearing production of the assignation intimated, found null. Dalr. 9. Dec. 1714. Watson.

Where

Where Parties must be cited, and Executions gone about.

EXECUTIONS against parties ought to be personally, or at their dwelling houses; and therefore an execution, bearing a copy delivered to the party's wife, was not sustained, unless it was added, That it was delivered to her in the party's dwelling-house. Stair, 11. Dec. 1679, *Cassilis*.—And an execution at the party's shop, by delivering a copy to his wife, was not found sufficient, unless the pursuer would offer to prove, That the shop was a part of the dwelling-house. Falc. 1. Feb. 1684, *Anderdon*. Harc. (*Summons*) Jan. 1686, *Nisbet*.—A citation, by leaving a copy with the party's servant, in a house in Edinburgh, where he lodged for the time, found null, as contrary to the 75. act, parl. 1540, which requires, That persons not apprehended personally, be cited at their principal dwelling-house. Forb. 13. July 1708, *Bruce*.

Execution against a party within the kingdom, must be personally, or at his dwelling-house.

A CHARGE of horning, given at a debtor's dwelling-house in the country, sustained, tho' he had lived more than forty days at Edinburgh. Stair, 11. Feb. 1674, *M'Culloch*.—An advocate, who had retired to the country after the session, being cited in a process at his house in Edinburgh, where he dwelt the preceding session, and which he had hired till Whitsunday, and his furniture remained in it, the citation being given in April, the Lords found the citation null. Fount. 30. Dec. 1702, *Gordon*.—An execution of arrestment against the Earl of Moray, at his house of Dunibirtel, on the 12. July, sustained, as being the Earl's principal dwelling-house, tho' he had removed with his family in the April before, to pass the summer at his house of Darnway, in the north, and preferred to a posterior execution of arrestment against the Earl, personally apprehended at his house of Darnway. Fount. 13. March 1707, *Irvine*.
—Citation

What understood to be a party's dwelling-house.

—Citation of one not personally apprehended, by leaving a copy at the dwelling-house of another, which the execution bore to be his special residence at the time, was sustained, the pursuer proving, that he had resided there for forty days before the citation. Forb. 22. Dec. 1710, Baillie.

A PARTY, being weak and prodigal, and within a few weeks of his majority, his father

Edictal citation. also, and other friends, intending to get him interdicted *causa cognita*, and

for that end, to give him a citation before the Lords; but he being spirited on to go away, by some designing to take advantage of his weakness, so that he could not be personally cited; the Lords, upon application of his friends, considering this to be an extraordinary case, and some documents of his levity being produced, did allow an edictal citation, and appointed also the person, who was alledged to have spirited him on to go away, to be cited, and referred to the Ordinary on the bills to try the matter of fact. Fount. 7. July 1697, Cockburn.—Found, That a vagabond may be summoned at the market-cross of the head-burgh of any shire, where he most commonly haunted, before the execution of the said summons. Balf. (*Summons*) 22. Feb. 1491, Home.

—In citing of a minor, it was found sufficient to cite his curators in general, at the market-cross of the head-burgh of the shire where the minor dwelt, tho' neither he nor they dwelt within the jurisdiction where the lands lay, the process being a poinding of ground. Dur. 26. July 1625, Rankeillor. The like; Forb. 29. July 1710, Fairholm.—Tho' in a process against a minor, his tutors and curators must be cited at the head-burgh of the shire, it is otherwise in legal diligences, which must be executed at the head-burgh of the regality; and therefore, a general charge executed against the minor personally, and against his tutors and curators, at the head-burgh of the regality where he dwelt, was sustained. Jan. 1724, Creditors of Houston.—A party having industriously absconded, the Lords granted a diligence to cite him edictally. Forb. 12. June 1705, Cochran.—During the rebellion 1715, upon an application that several people, in whose hands the petitioner wanted to lay on arrestments, were engaged in the rebellion,

tion, or did live in shires to which there was no *tutus accessus*, and therefore craved special warrant to arrest at the cross of Edinburgh, as being *communis patria*, and nearest to Fife, which, and the more northern counties, were in the enemy's power; and likewise warrant to arrest at the pier and shore of Leith, and that citations in the forthcoming might proceed in the same manner; the Lords granted the supplication, the petitioner first condescending upon the persons, that they might be satisfied by sufficient documents, or their proper knowledge, that these persons did reside in shires to which there was not *tutus accessus*. Dair. 2. Dec. 1715, Ashurt, &c. supplicants.

IT was found sufficient to summon a man that was forth of the kingdom, at the cross of Edinburgh, &c. without necessity of *Party forth of the kingdom*. citing him at his dwelling-house, where his wife and children still resided. Had.

4. July 1611, Carmichael.—The city of Edinburgh was found to be *communis patria*, so that citations are null, being against parties that are out of the country, if not executed at the cross thereof, tho' executed at the pier and shore of Leith, at the cross of the head-burgh of the shire, and also at the cross of the town, where the party has his domicile and family; on which account, a decree of apprising was found null. Dur. 4. June 1631, Christie.—The Lords found a denunciation at the market-cross of Edinburgh, as *communis patria*, sufficient against a party out of the country, altho' the lands lay in another shire. Newb. 4. July 1666, Cunningham.—In a declarator of single and liferent escheat, it was objected, That the horning was null, upon which the gift proceeded, because the denunciation was only at the market-cross of Edinburgh; whereas it ought also to have been at the pier and shore of Leith, the party being out of the kingdom. The Lords sustained the horning, because it being upon an act of adjournal of the justice-court, it is sufficient that the denunciation be at the market-cross of Edinburgh, as is declared by act 128, parl. 1592. Home, July 1687, Shiel.—The Lords sustained an order of redemption, tho' used at Edinburgh, notwithstanding the lands lay in another sheriffdom, this being a legal reversion near expired: but at

the time of using the order, the debtor was out of the country; and Edinburgh is understood to be *communis patriæ*. Dur. 22. Feb. 1631, Murray. — There being a special place appointed in a reversion; for consigning the money, and the wadsetter being beyond seas; the Lords granted warrant to make premonition at the market-crofs of Edinburgh, pier and shore of Leith, &c. Anch. (*Redemption*) 8. Feb. 1632, Dyel. — Requisition against a party out of the country, ought to be at the market-crofs of Edinburgh, pier and shore of Leith only. Gosf. 15. July 1669, Leith. Gosf. 16. June 1671, Lovat.

IT was found, That a party put to the horn, must be denounced at the head-burgh of the shire where he resides, otherwise, the denunciation is null; and this conform to the act 75. parl. 1579, notwithstanding of 100 years uninterrupted custom to the contrary. Colv. June 1583, Angus.

By act 268. parl. 1597, letters of hurning, &c. against persons living within a regality or stuartry, must be executed at the market-crofs of the regality or stuartry, under certification of nullity: Yet in a general declarator of liferent-estheat, it being objected, That the denunciation was at the market-crofs of the shire, tho' the debtor dwelt, and his lands lay within the regality of Torphichen; and it being answered, That within the memory of man, no denunciation had been at the market-crofs of the regality: The Lords sustained the answer, unless the defender could prove, that there was a public office, and clerk of regality, to keep the records of burnings, &c. Gosf. 11. Stair, 12. Jan. 1672, Scot. — The like; Spot. (*Horning*) Stirling. Stair, 19. June 1674, Murray. — In a similar case, the Lords distinguished between lands lying locally within a regality, and lands lying at a distance, made part of a regality by annexation; and found, that tho' there was a public office and clerk of regality, yet, with regard to annexed lands, there was a necessity to denounce there, unless such had been the use and wont. Gosf. 10. Dir. Stair, 11. Jan. 1677, Scot.

THE Lords found, that relaxations must be executed at the head-burgh of that same shire where the denunciation was made; other-

otherwise that they are null, and hinder not the life-rent-estate to fall. Gosf. 27. July 1675, Arbuthnot.

A COMPRISING was found null, because the lands, lying within a regality, the denunciation was made, not at the head-burgh thereof, as appointed by act 268. parl. 1597, but at the head-burgh of the shire. Balf. (*Comprising*) penult. Feb. 1562, Seton. Harc. (*Comprising*). Jan. 1684, Calderwood.

Denunciation of comprising.

AN inhibition found null, upon act 268. parl. 1597, even as to lands within the sheriff-dom where it was executed, because not executed at the market-cross of the head-burgh of the regality, where the party inhibit dwelt. Dur. Hope, (*Inhibition*) 39. Jan. 1629, Stirling. Jan. 1732, Stirling.

Inhibition at what market-cross?

—Lands within a shire, being annexed to a regality, quoad jurisdiction; an inhibition served at the head-burgh of the shire only, was, by the Lords, found valid. Gosf. 12. Feb. 1669, Lithgow.—The Lords sustained an inhibition, tho' not executed at the market-cross of the regality where the lands lay, because it was published in the usurper's time, who abolished all regalities; tho' it was alledged, that his authority could not change acts of parliament; and that, even in the English time, they were in use to publish inhibitions, and other diligences, at the regality market-cross. Fount. 25. Feb. 1680, Southesk, &c.—An execution of inhibition being quarrelled, because not executed at the head-burgh of the jurisdiction where the party's lands lay; the Lords desiring to make a standard in this affair *pro futuro*, did first, before answer, obtain a trial to be taken, by searching the registers how the custom lay, that they might square their decision accordingly. Fount. 12. Jan. 1710, Gray. After which search, their Lordships having advised the cause, they found no need to execute an inhibition at the head-burgh of the jurisdiction, where the lands of the inhibited person lay; but that it sufficeth, after executing against him personally, or at his dwelling-house, to execute at the market-cross of the head-burgh of the jurisdiction where he dwells, and record the inhibition and execution, either in the particular register of the jurisdiction where his lands are, or in the general register.

ster. Which, after long debating among themselves, the Lords resolved, should be a fixed rule in time coming. Fount. Forb. 14. Feb. 1710, *inter eosd.*—The contrary had been found, Stair, 18. July 1662, Swinton. Fount. 26. July 1674, Cleland.

AN inhibition executed against the debtor, at his lodgings in Edinburgh, and against the lieges at the market-cross of Aberdeen, within which jurisdiction, the debtor's principal dwelling-house was situated, was found null: for, without much reasoning upon the point, whether it was habilely executed at Edinburgh, which the Lords inclined to think it was, if the debtor had been forty days there, they were clear, that it ought also to have been executed against the lieges at the market-cross of Edinburgh; and that in no case, it is regular to execute an inhibition personally at a debtor's dwelling-house, within one jurisdiction, and against the lieges at the market-cross of another jurisdiction. 8. Nov. 1739, Baird.

Execution in the Night-Time.

IT was not found a nullity, That a charge of horning was given in the night-time. Stair, 11. Feb. 1674, McCulloch.—A poinding was found unwarrantable, not only after sun-setting, but in the morning before it rise; and therefore action of deforcement, in that case, was not sustained. Dur. 1. Spot. (*Deforcement*) 7. Feb. 1628, Halkerton.—Poinding is not valid, unless begun before sun-set, and ended during day-light. Stair, Dirk. 11. Feb. 1675, Douglas.—The Lords agreed, that ejections could not be warrantably made in the night-time; but, in the present case, the ejection being begun with day-light, within an hour or less of the sun-rising, some of them thought it could not be called illegal, there being neither law nor decision condemning that practice: yet the plurality found the ejection illegal, being before sun-rising, and ordained the pursuer to be repossessed accordingly. Fount. 28. Feb. 1702. Fount. Dair. 10. Nov. 1703, Gordon.

The

The Execution must specify the Names and Designations of the Parties, Dwelling-Houses, &c.

AN inhibition was found null, because, altho' the party was inhibited, according to the letters, at his dwelling-house, yet not by name and surname. Hope, (*Inhibition*) 19. March 1628, Lamb. The Lords found an execution null, upon act 6. parl. 1672, because it designed not the party, but contained only his name. Home, Feb. 1687, Maxwell. The Lords sustained an inhibition, altho' the execution was written on a paper a-part, and yet bore not any designation of persons, but only, in general, *the within designed*. But this execution was some years before the act 6. parl. 1672, and the Lords here, having first taken trial how the stile run in those days, they found many of them conceived in the same manner. Fount. Forb. 14. Feb. 1706, Leven. The Lords sustained the execution of an inhibition, altho' it did not design the inhibitor, or party inhibited, otherways than by a general relation to the letters; and it was found, That the act 6. parl. 1672, relates to summonses only, not to executions of legal diligences. Forb. 8. July 1713, Baillie.

EXECUTION at the dwelling-place, ought to name the place, otherways it is null. Colv.

July 1582, King's advocate. Had. *Of the dwelling-house.*
Feb. 1609, Johnston. Fount. 21.
Feb. 1693, Guillean. — An execution of a horning was not found null, for not designing the debtor's dwelling-place particularly at which he was charged, in regard the debtor was designed by the stile of the room, at his dwelling-place there. Dur. 9. Nov. 1632, Montgomery. — In a question about the validity of the execution of a horning, bearing, to be given at the party's dwelling-house, without designing the same, the Lords found, That the party's house and stile being the same, and he being designed in the execution by his stile, it must be presumed, the charge was given at his dwelling-
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dwelling-house of that name. Fount. 8. Falc. 12. Feb. 1684, Creditors of Crichton.—But the execution of a charge of horning against a party, 'burgess of such a place, at his dwelling-house, not adding the word (*there*) was found null, and the magistrates sued for suffering the debtor to escape, were affoizied. Dur. Spot. (*Horning*) 14. July 1626, Adams.

AN execution of letters of intimation of an assignation, &c. was sustained, altho' it was on a paper apart from the letters of intimation, and did not bear the date of these letters, which were the warrant thereof. Forb. 16. Feb. 1711, Forbes, &c.

Execution, if it must bear the date of the letters?

Execution, not particular as to the time the charge was given.

A HORNING, raised against many parties, and executed upon the first, second, third, fourth, &c. days of such a month, but not relating what day each particular man was charged upon, was, nevertheless, sustained. Had. 3. June 1595, Arncaple.

Execution by leaving a Copy.

A HORNING was found null which bore delivery of a ticket, containing the tenor and substance of the letters, because it bore not this word, *copy*. Hope, (*Horning*) 20. July 1627, Monteth.

INHIBITION sustained, tho' the execution did not bear delivery of a subscribed copy to the party, tho' a necessary solemnity, by act 141. par. 1. 92, in respect the execution bore delivery of a copy, and the act does only require, that the copy be signed by the messenger, which was done, not that the execution should bear that the copy was signed. Forb. 8. July 1713, Baillie. Fount. 15. Jan. 1706, Loch.

IN an execution of arrestment, the Lords found no necessity

necessity of affixing a copy upon the most patent door, where a copy was delivered for the party to his wife, within his dwelling-house. Stair, 11. Dec. 1679, Cassillis.—In a declarator of escheat, at the instance of a donatary, the Lords found the execution of

In execution at a dwelling-house, how the copy must be left.

the horning null; because, tho' it bore, That after six knocks, the messenger left a copy of the letters, in regard he could not apprehend him personally; yet it did not bear with whom it was left, or, that it was affixed at the most patent door. Fount. 8. July 1698, Blair.—The Lords sustained the execution of a summons, tho' they did only bear, copies to have been left at the door of the defender's dwelling-house, without addition of most patent. Forb. 19. June 1712, Garden.—The execution of a warning to remove, was found null, bearing only, that a copy was left at the house. Harc. (Removing) Feb. 1684, Threapland.

A CHARGE, given to two bailies of a regality, to take a rebel then present with them, was sustained against them both, tho' the execution bore only, "That one copy was delivered to one of the bailies for himself and for the other bailie, they being both present together."

A copy left with one in name of another.

Dur. 19. Nov. 1628, Rae.—In a reduction of an inhibition, served against a wife and her husband, she being sior and heiress of the lands, and yet the copy being only given to the husband personally, but not to the wife; the Lords were of opinion, That if the copy had been given at the husband's dwelling-house, it might have been sustained as sufficient, that being likewise the wife's domicile; but being delivered to him personally apprehended elsewhere, it could not supply the defect of an execution against the wife, who had the principal interest, the husband being only *pro interesse*; therefore they reduced the inhibition, as null *quoad* the wife; tho' it was alledged, That it was all one as if it had been the copy of a summons delivered to a tutor, which would certainly serve for a citation to the minor. Fount. 10. July 1702, Keir.—The like, in the execution of a summons. Forb. 30. June 1709, Galloway.

THE Lords, in a question about the execution of inhibitions, resolved, as to the future, *In local executions, how the copy must be left?* That such executions should be null, unless copies were affixed on the market-cross, in respect there can be no executions, without giving of copies, either personally, or at their dwelling-

house; and when the lieges are inhibited at the market-cross in general, so that a copy cannot be given to every person, it ought to be left at the market-cross in *subsidium*. Dirl. 22. Dec. 1676, Stair, 12.

Feb. 1670, Napier.—Execution of an apprising sustained, tho' it did not bear a schedule to be left on the ground of the lands. Fount. 20 Dec. 1705, Serimzeour.

—An objection against an apprising. That the execution did not bear a copy so have been affixed upon the market-cross, but only that a copy was left there, found relevant to keep the legal open, and restrict the apprising to the principal sum and annuallents. Forb. 20. Dec. 1710, Baillie.—The execution of an inhibition, bearing the affixing a copy on the market-cross, but wanting these words, *I left a copy*, and this being objected as a nullity; the Lords did not find the want of these words to be a nullity, unless the alledger offered to prove, that the copy was fraudulently taken down. Forb. 21. Fount. 25. July 1710, Hope.—The Lords sustained denunciation upon a horning, altho' it did not bear, that a copy was affixed and left upon the market-cross. Forb. 30. Nov. 1711, Semple.—The Lords sustained an inhibition, tho' the execution bore not that a copy was both affixed and left at the market-cross, but only, that a copy was left at it. Forb. MS. 26. Jan. 1714, Creditors of Dunbar.

A CHARGE of horning being given at the debtor's dwelling-house, he not being personally apprehended, it was found a nullity, that the messenger, or witnesses, did take away the copy of the charge to conceal it from the debtor, without necessity to alledge, that they were instructed so to do. Stair, 11. Feb. 1674, McCulloch.

A DEFENDER insisting in a no-process, because the copy, signed and delivered to him by the messenger, was not conform to the summons; it was answered, That the execution must bear faith, men-

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tioning the delivery of a just copy until it be disproved ; nor is the truth of the execution redargued by the lame copy produced, which may have been made up, *ex post facto*, in concert with the messenger, in order to cast the process. The Lords repelled the objection. 11. Jan. 1726, M'Donald.

Three Blasts of the Horn.

A HORNING, bearing in its execution, That the rebel was denounced by open proclamation, and put to the horn ; it was sustained, altho' it neither carried, that the messenger lawfully denounced him rebel, nor blew any blasts of the horn. Had. 19. Jan. 1611, Hepburn. — A denunciation to the horn was sustained, altho' it made no express mention of three blasts of the horn (no law expressly requiring it) but only, that the messenger lawfully denounced. But the messenger and witnesses being still alive, the party was ordained to prove, that the three blasts were given, tho' not expressed in the denunciation. But if they had been dead, the Lords inclined to sustain the denunciation without necessity of such probation. Dur. Spot. (*Horning*) 4. March 1624, Drysdale. The like ; Spot. (*Horning*) Dur. Hope, (*Horning*) 22. March 1626, Somervell.

Public Reading and Oyesses.

THE Lords annulled a horning, (in a declarator of escheat) because the denunciation bore only three oyesses, instead of three oyesses ; so there was nothing wanting but the letter (*r*). Fount. 20. Feb. 1680, Gordon. — The Lords sustained the execution of an arrestment at the market cross, &c. against a party, tho' wanting the intimation of three oyesses ; because, in a former case, observed by Lord Stair, 15. Feb. 1681, Gordon, the Lord register being ordained to try the custom, as to the oyesses, it was found to vary ; and tho' an act of fedyment was then intended, appointing the oyesses for the future, yet it was not done. Fount. 7. Dec. 1698, Yeaman. — Execution of apprising sustained, tho' it bore not three oyesses, but only several oyesses. Fount. 20. Dec.

Dec. 1705, Scrimzeour. An inhibition found null, because the execution thereof, at the pier and shore of Leith, did not bear three oyeses, nor public reading thereof. Dal. Bruce, 22. Feb. 1715, Clark.—An inhibition sustained, tho' the execution at the market-cross bore only *three oyeses, open and public reading*, and wanted the words *open proclamation*; in respect it was alledged, that three oyeses and public reading, imports *open proclamation*; and after trial, the stile of many executions of inhibition were found to run in the same tenor. Fount. Forb, 14. Feb. 1706, Leven.

Six Knocks.

AN execution of a horning was reduced, because it contained not six knocks. Col. Dec. 1589, Menzies.—Execution of an inhibition, bearing to be *at the dwelling-house*, was found null, as it bore only, that *several knocks* were given at the door thereof, and did not bear expressly *six knocks*, as prescribed by act of parliament. Stair, 29. July 1680, Hay.—In a declarator of escheat, this nullity was objected against the execution of the horning; viz. that it did not bear the messenger to have sought entrance before the giving of the six knocks, was repelled, because this would overthrow the most part of the executions in Scotland, and therefore found this formality sufficiently included in the six knocks. Fount. 30. July 1696, Sinclair.—The like, with regard to the execution of an apprising; Fount. 20. Dec. 1705, Scrimzeour.—The Lords found the execution of an inhibition null, because it bore three knocks only to have been given at the most patent door of the person's house, against whom the letters were executed; and the act 75. parl. 1540, requires the giving of six knocks, where the messenger cannot get entry; altho' the certification, expressed in the statute, for not observing that formality is imprisonment, and an arbitrary punishment of the officer contravening. Forb. Fount. 24. June 1707, Gordon.—In an execution of arrestment, there was found no necessity of knocks, where the doors were patent. Stair, 11. Dec. 1679, Cassilis.—The Lords sustained a citation, tho' not mentioning six knocks given conform to law, and tho' it did not bear personally apprehended, but

but only a copy left with some of the family, at the defender's dwelling-house. Fount. 17. July 1702, Biggar.

Stamp.

A HORNING was found null, because no vestige of a stamp appeared, altho' the execution bore, in common form, that the messenger had affixed his stamp. Dur. 6. March 1624, Stewart.—The Lords found, That the executions of an inhibition, nor being stamped conform to the act 82. parl. 1469, and act 74. parl. 1540, were null, with the inhibition, and all following thereon, *quoad* a third party acquiring *bona fide* after the inhibition. Fount. 4. Feb. 1681, Van Lovan, &c. Home, Feb. 1687, Maxwell.—Before stamping of executions was declared unnecessary by the act 4. parl. 1686, the Lords reduced a horning, and found it null, because there was no print nor vestige of a stamp on the execution. Fount. 12. Feb. 1686, Livingston.—It being objected, as a nullity in a horning, that tho' the executions bear to be stamped, yet no vestige of the stamp appears, and the executions are but a recent deed *in anno* 1682. Answered, in fortification of the execution, asserting itself to be stamped, it is offered to be proved, That, at the outgiving of the process, a vestige of the stamp did appear. The Lords found the answer relevant. Marc. (*Horning*) 10. Feb. 1688, Buchanan.

Denunciation upon a Horning.

IT being objected as a nullity of a denunciation, that it bore not the messenger to have read at the market-cross, the execution of the horning, as he did the horning itself, and as was constantly in use to be done, conform to a resuscitate under the hand of the keeper of the register of hornings; the Lords found, That there was no express law, nor act of parliament requiring that solemnity, and that the custom was not come to be so fixed as to be obligatory, there being denunciations both ways; and tho' some cautious messengers adjected that formality, this was not enough to make it grow up to an universal uniform practice; therefore they repelled the

the nullity, and sustained the denunciation. Fount. 18. July 1702, Bogle.

Execution against a Body-corporate.

IN a process against the York-building company, this objection was proponed, That both summons and execution were void, being against no person whatever, by name or designation, but in these general terms, *The governor and company*. Answered, The defenders are a body-corporate, named in their charter, in the terms they are summoned, and authorised to sue and defend in that character, and are thus designed in the contract libelled. This was pled to difference the case from that of a burgh-royal, in whose contracts the provost, bailies, &c. are expressed by name, and so ought to be cited by name. The Lords repelled the objection, and sustained process. Jan. 1733, Murray.

Inchoat Diligence not carried on, if it falls by Lapse of Year and Day?

IT was found no nullity in a horning, that the denunciation was more than a year after the date of the charge. Had. 13. March 1610, —Inhibition sustained, altho' the execution, against the lieges at the market-cross of the regality, was more than a year subsequent to the execution against the party. Dur. 17. July 1627, Fairnie's bairns.—Summonses fall, if not called within year and day. See Process.

Execution of a Charge to enter Heir.

A DECREE, *cognitionis causa*, in order to adjudge, proceeding on a charge to enter heir, yet the execution wanting these words, "That he charges them to enter heirs within forty days, conform to act of parliament, James V. with certification, that sick-like execution shall pass against them, as if they were actually entered;" tho' the execution bore, to proceed on a general charge, and summoned them to the effect within written; nor was the objection made at obtaining the decree

decree *cognitionis causa*, neither was the reduction of the adjudication, following thereupon, raised to annul it *in totum*, but only to cut off the odious accumulations. The Lords found, the execution of the general charge to enter heir to be null: yet, since it was not quarrelled at the time, they found it could not annul the adjudication *in totum*, but only restrict it, and cut off the legal and accumulations. Forb. 21. Fount. 22. June 1710, Strachan.

Form of Arresting a Ship.

ARRESTMENT of a ship, upon an admiral precept, is good, if intimated personally to the possessor, tho' the officer, who executed the arrestment, neither take the sails nor rudder, from the ship in the usual manner, according to the direction in the precept, nor leave a copy of the arrestment affixed on the ship, nor deliver a copy of it to the debtor. Dur. 22. March 1637, Finnie.

Executions that require not the ordinary Solemnities.

A CITATION of a tenant to his master's baron-court, needs not be by giving a written execution, and may be disproved by witnesses. Dur. 11. July 1634, Hay. Verbal warning at the house within burgh, is sufficient to support an action for removing, without any written execution, or publication at the parish-church. Dur. 18. July 1634, Hart.

Executions bearing in general to be lawfully gone about.

AN inhibition was found null, the execution not bearing the public reading of the letters at the cross, and three several oyeses; tho' it bore, that the messenger lawfully inhibited the lieges. Gosf. 10. Stair, 11. July 1676, Stevenson.—A decree 20 years old, being quarrelled, because it did not bear the party to be personally apprehended, but only, that he was lawfully cited; the Lords repelled the objection, the party being lawfully

cited to give his oath, and he could not be lawfully cited, unless personally apprehended; and it is presumed, that *omnia erant solemniter acta*, unless it was made appear by production of the execution, that the defender was not personally apprehended. But reduction was reserved as accords. Dirl. 29. Jan. 1675, M'Intosh.—Execution of inhibition against the party inhibited, found null, not bearing the delivery of a copy, but only, “that the debtor was inhibited personally apprehended.” Stair, 28. July 1671, Keith.—An expired comprising was found null, where the execution of the letters bore not the delivery of a copy to the debtor, but only “that he was personally apprehended and lawfully warned.” Falc. Harc. (*Comprising*) 23. Nov. 1681, Sanders.—An execution of arrestment, bearing that the letters were duly and lawfully executed against the party personally apprehended, but not that a copy was left, found null and informal. Harc. (*Arrestment*) Feb. 1682, Cunningham.—The execution of an inhibition, bearing personally apprehended, yet not mentioning that a copy was delivered, being quarrelled as null; the Lords found, That the want of these words, in the execution, *that he delivered the party a copy*, was not a sufficient nullity; but was supplied by these words, That he lawfully inhibited him personally apprehended; which word (*lawfully*) implied, that all solemnities were legally adhibited; law presuming *pro instrumenti veritate*. But several of the Lords, thinking this too great a latitude to messengers, making them judges of what was legal execution; therefore, lest this decision should prove dangerous, the Lords, a few days thereafter, ordained the custom and general stile of such executions to be entered in the registers, and upon a report made, that about the time of executing that inhibition, many others were found to have been executed in the same manner; the Lords adhered. Forb. 16. Fount. 18. Nov. 1709, Crombie.—Execution of an inhibition, bearing, “several knocks, and that the party was lawfully inhibited,” found null, for wanting of *six knocks*. Stair, 19. Nov. 1680, Hay.

Clauses implying or importing particular legal Steps of Execution.

AN execution of a charge was sustained, altho' it bore not that the messenger charged the party personally apprehended, seeing it bore that he delivered a copy to the party, which implied a personal execution. Dur. 22. July 1626, Stewart.—An inhibition was found null, the execution not bearing a copy affixed at the pier of Leith, but at the cross of Edinburgh, tho' it bore, "a copy left at the market-cross of Edinburgh, before these witnesses, &c. at the market-cross of Edinburgh, and pier and shore of Leith *respective*;" which was not found to import leaving of a copy. Stair, Fount. 22. Feb. 1681, Ewing.—The execution of a horn-ing against one not personally apprehended, was sustained, altho' it bore not expressly, that the messenger left a copy, but only that he left a *just and authentic* in the lock of the most patent door of the party's dwelling-house, which could import nothing but a copy. Forb. 23. Feb. 1709, Seafield.—Found that the execution of a denunciation, bearing three oyeses, did import open proclamation and public reading. Harc. (*Messengers*) Nov. 1683, Baillie.—An execution of an inhibition was sustained, tho' it wanted three oyeses, bearing the public reading and open proclamation, which last did import three oyeses. Fount. 14. Feb. 1694, Morison.

Execution returned blank to the Party.

AN execution being signed by the messenger and witnesses blank, and so transmitted to Edinburgh, and there filled up by the agent, which was then a common practice; the Lords were all clear, that it was *prava consuetudo*, and of ill consequence; yet thought, that the precedent might be as dangerous on the other hand, for it had been generally done, and *error communis jus facit quoad præterita*, otherwise, the half of the decrees and proceffes in Scotland might be annulled: they therefore repelled the nullity, without pre-judice

Judice of disproving the execution as accords; but resolved, by an act of sederunt, to discharge the practice in time coming. Fount. 9. Jan. 1700, Abernethy. — An execution being signed blank by the messenger and witnesses in the country, and sent blank to Edinburgh, where it was filled up with a formal execution; only the messenger had sent along with the blank, a short note, or minute, under his hand, containing some few of the essentials of an execution; the Lords sustained the execution, unless the other party would prove by the witnesses inserted, that the solemnities of six knocks, leaving a copy, &c. were not used; but for time to come, the Lords, thereupon, made an act of sederunt, discharging such blank executions under pain of nullity, besides deprivation of the messenger. Fount. 28. June 1704, Sinclair.

Verbal Citation.

DECREE of the sheriff was found null, being upon a verbal citation only; for, tho' of old, when writing was rare, verbal citations were allowed, as to this day they are in baron-courts, yet now since writing is common, and that the act 5. par. 1681, and act 12. par. 1693, require subscribing witnesses to executions of messengers, verbal citations are not to be sustained. Fount. 19. July 1694, McKean.

LETTERS of arrestment cannot be execute in the name of the obtainer's executor. *Falc. Later decisions.* vol. I. p. 96. Stewart, 11. June 1745.

A DEUNCIATION of a horning, against a person out of the kingdom, at the market-cross of Edinburgh only, does not give currency to annualrent. *Falc.* vol. I. p. 295, Watson, Nov. 27. 1747.

AN execution was sustained, bearing delivery of a debtor's person, without saying to whom, before witnesses, but adding, after inserting the witnesses, that the person was delivered to a bailie. *Falc.* vol. I. p. 322. Rem. Dec. p. 147. Gall, 16. Feb. 1748.

A POINDING may be execute a year after the charge to pay. *Falc.* vol. II. p. 184. Anderson, 7. Nov. 1750.

A POINDING was found null, where the appretiators

tors at the cross were the same with those on the ground. Falc. vol. II. p. 296. Geddes, 6. Dec. 1751.

THE objection to an execution, That the town-council should have been cited as well as the magistrates of the town, was sustained. Home, p. 379. Clarkson, 9. June 1743.

THE execution of an inhibition, need not express that it was executed at the head-burgh of the jurisdiction, where the debtor resided. Home, p. 427. Competition, Campbell, &c. 19. June 1744.

A NULLITY in an execution may be supplied, by producing another after the process is called, given out, and defences returned. Home, p. 437. Beg. 7. July 1744.

A COMPLAINT, against the magistrates of Rutherford, for an undue election, being appointed to be served against them, the complainers, instead of extracting the complaint and the interlocutor, and delivering the extracts to a messenger to be executed against the magistrates, took the short-hand way of delivering to the messenger the principal complaint itself, with the interlocutor subjoined. It was objected, That this form was irregular; because the records of court ought never to be carried out of court, and the only proper warrant for executing, is an extract under the hand of the clerk of Court. Elchies observed, That commonly the king's authority is interposed by letters under his signet, for citing persons to appear before the Court of Session, but that, in matters which require dispatch, it is customary for the Court to cite by their own authority, as in summary complaints, which are constantly served by authority of the Court, without the intervention of the king's authority; the extracted complaint and warrant for citing being delivered to the messenger, without passing the signet.—As to the objection of delivering the record itself to the messenger as his warrant, he observed, that it was the custom of old for macers to cite all parties within two miles of Edinburgh, carrying with them the record itself as their warrant; and that he has seen in the journals of this Court, an instance of an order directed against a secretary of state, to enter his person in ward, within three hours, which must have been served upon the secretary by the authority of the interlocutor

locutor itself, as there was no time for extracting. The Lords accordingly repelled the objection. Rem. Dec. p. 126. Burgesles of Rutherglen, 5. July 1747.

IN a competition, it was objected to an inhibition at the instance of Robert Allan, that it was executed upon the 5. Feb. 1696, against Sir George Hamilton, at his dwelling-house in Edinburgh, by affixing a copy upon the most patent door, &c. ; and to an inhibition, at the instance of Robert Halyburton, that it was executed on the same day ; likewise against Sir George, as forth of the kingdom, at the market-cross of Edinburgh, pier and shore of Leith, and, that as he could not be in the kingdom, and out of it at the same time, one of the executions behoved to be null. To this it was answered, 1st, That he might, on the same day, be both in the kingdom and out of it ; so that both executions might be good, supposing them to be execute at different times of the day. 2^{dly}, That the two executions could not be set up in opposition to one another ; each creditor stood on his own ground, and the objector must chuse which execution he would object to, and prove his objection. The Lords repelled this objection to the executions ; but reserved to the objector, to disprove either of these executions, as he should be advised. Fac. Col. vol. I. p. 12. Blackwood, 9. June 1752.

AN execution of a summons, mentioning, that the witnesses subscribed the same, but not expressly bearing, that they were present when the citation was given, was sustained, as sufficiently implying the presence of the witnesses. Fac. Col. vol I. p. 46. Clerk, 17. July 1752.

IN ranking and sale, an objection was sustained, that the common debtor was cited under a wrong christian name, altho' he was so particularly designed as to his profession and quality, that *constabat de persona*. Fac. Col. vol. I. p. 116. Dalgliesh, 6. July 1753.

IN a ranking of creditors, it was objected, That an inhibition was null, for that the execution of it bore, that " a copy was fixed upon the door of the debtor's house, " after the messenger had made six several knocks, as use " is, *because he could not get the debtor personally*," where- as the 75. act, parl. 6. James V. authorises this method of execution, in the case only, when access to the house

cannot.

EXECUTOR.

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cannot be got, or the servants refuse to receive the copy, neither of which the execution bore. The Lords repelled the objection. Fac. Col. vol. L p. 314. Gory. 16. Nov. 1756.

SHERIFF-officers are authorised to officiate as messengers in executing a diligence against witnesses and havers in a sale. Fac. Col. vol. III. p. 318. Mitchell supplicant. 19. June 1764.

INHIBITION of teinds, where to be executed? See Tack.

FORM of the execution of warning. See Removing, IF a messenger is allowed to mend his execution after being produced in judgement? See Litigious.

FORMALITIES of execution, as to witnesses inserted and subscribing. See Writ.

UPON what number of days must citation be? See Inducia Legales.

DEFECTS in executions, how far suppliable by witnesses? See Proof.

EXECUTIONS by deprived messengers. See Consuetude.

EXECUTIONS of inhibition must be signed by the clerk. See Registration.

EXECUTOR.

A LADY, having a general disposition to all her husband's moveables, the Lords, in a competition for the office of executry between her and her husband's nearest of kin, preferred the latter; because they thought, that her disposition from her husband to the moveables, was, at most, but an universal legacy, which never excludes the executor from confirming. Fount. Dalr. Forb. 27. Jan. 1708, Harden. Who entitled to the office?

THERE cannot be a second principal confirmation of the same subject, and therefore the first confirmation of the ware contained in a certain shop, tho' only general, was preferred to a second confirmation of the same, condescending upon the particular ware. Stair, 18. Jan. 1662, Fairholme.—A sum due to a deceased. Cannot be two confirmations of the same subject at the same time.

deceased.

deceased, falling to three brothers and a sister, equally as nearest of kin; and one of the brothers preventing the rest, by confirming himself sole executor to the whole sum, and then assigning the same; and thereafter the other three, upon notice of this, also confirming themselves, both parties having charged the debtor; the Lords, in a suspension of multiple-poining, thought that the nearest of kin had not taken the habile way of affecting the sum in question by a second confirmation, since the commissaries ought not to make two principal confirmed testaments to the same subject; but that their legal method was, to have raised a process against the executor confirmed, to denude of their shares of the executry goods, and, on that dependence, to have arrested in the debtor's hands: however, the Lords, in this case found, That the executor could not assign the whole, so as to prejudice the other nearest of kin; and therefore found the assignation null as to their parts of the sum assigned, so that the right returning to the cedent, as if it had never been out of his person, the others could oblige him to denude, and, upon his assignation, force the debtor to pay them their shares. Fount. 28. Jan. 1704, Robertson.

A CONFIRMATION of a debt, due by a debtor named, was sustained, tho' neither the

Form of confirmation.

sum nor the security was condescended on, and therefore, a second particular confirmation, of the same subject, was found null. Fount. 8. Dec. 1693, Kinfawna.—A wife, being confirmed executrix, *qua* nearest of kin, the husband, who was also conjoined in the confirmation, *for his interest*, did, after his wife's decease, lead an adjudication upon one of the bonds confirmed. Many years thereafter, in a competition of creditors, the adjudication was objected to, as deduced by a person who had no right to the debt, the husband being only confirmed for his interest, which was at an end by the death of his wife. When the question came before the Lords, an inquiry was ordered into the practice of the commissary court, with regard to the confirmation of married women; and it was reported as the practice of that court, that the wife only was confirmed: upon the adjudication was sustained, seeing it appeared, that

that the husband was confirmed joint executor with his wife, and the office behaved to accresce to him after her decease. 8. Nov. 1738; Ewart.

THE Lords sustained a restatement, tho' it bore not that the executor, at the confirmation, made faith and deponed on the inventory, but only that it was faithfully made, and given up by him, altho' the instructions to the commissaries require executors to make faith. Forb. 10. Dec. 1707, Lees.—In a process against an executrix, which resolved into a compt and reckoning, and the pursuer alleging, he was not bound to compt, till she renewed her caution to the commissaries as executrix, her former cautioner being dead, the Lords ordained her to renew her caution, before the pursuer should be obliged to compt to her, tho' her former cautioner was her father, to whom she succeeded in *universum jus*. Fount 9. Dec. 1709, Menzies.

Executor must make faith, find caution, &c.

IT was found, That an executor cannot renounce the office, if he has had the least intromission, *quia res non est integra*. Balf. (Executor) 28. June 1561, Learmont. 7. March 1569, Murray's renunciation.

Executor may renounce rebus integrit.

AN executor is but a trustee, and cannot gratuitously discharge debts owing to the deceased; Home, Dec. 1721, Kinloch.—Nor can he uplift in prejudice of an assignation granted by him, after the same is intimated; tho' an executor, before he make the debt his own, by taking decree in his own name, cannot assign *cum effectu*. Stair, 24. Nov. 1674, Bussie.

Cannot gratuitously discharge, nor uplift in prejudice of his assignee.

THE relict has no action against the deceased's debtors for her third. She must sue the executors, or confirm herself executrix-creditrrix, if there be no executors. Had. 13. March 1612, Dunduff. Dur. 14. Feb. 1622, Steven. 7. July 1625, Falconer. 9. Dec. 1628, Mackie. Forb. 12. Dec. 1713, M'Aulay.—The contrary once found, viz. That the relict had

The executor has the only title to intromit with the subjects confirmed.

had a direct action against a debtor, for her third of a bond, due by him to the deceased. Dur. 11. March 1623, Dougal.—And a bond, being conceived to husband and wife, and longest liver, the relict was allowed direct access against the debtor, for payment of the annualrents. Here the husband died before the term of payment, and the subject consequently was moveable. But it is not clear from the decision, whether the husband's executors had confirmed this subject; if not, the relict, no doubt, had a direct interest, needing no confirmation. Dur. 7. July 1625, Falconer.—A *legatum nominis* being left, the executor, nevertheless, and not the legator, was found to have right to sue for it, because the debt, quot, &c. must first be deducted. Mait. 23. March 1564, Executors of the bishop of Dunblain.—A legator cannot sue the debtor for his legacy, not being *speciale legatum*, where there is an executor confirmed, unless the executor omit to confirm the same. Had. Hope, (*Legacy*) 4. Feb. 1623, Leitch.—There being a *legatum nominis* left, with power to the legator to sue for the same himself, and the executor not having confirmed, but omitted the same; the Lords found the executor ought to confirm, and add the same to the inventory, and make the legator assignee thereto, or lend his name to sue for the same; and that the legator should have the expence of the suit paid him, by the executor, out of the first free goods. Dur. 2. Dec. 1628, Pool.—Yet action was sustained at the instance of an universal legator, against an intromitter with the deceased's effects, the executor confirmed being called in the process. Dur. 20. Feb. 1627, Bisset.

AN executor cannot safely pay, unless upon decree, so that he may have a sentence for his warrant. Stair, 18. Nov. 1675, Binning.—And this, tho' the debt he has paid, be instructed by writ. Stair, 11. Nov. 1664, Johnston.—A father, having disposed to his daughter, the half of his free goods at his death, and she having intromitted, without confirming, a demand was made upon her by one of the deceased's creditors, upon a clause of warrandice; and it was found relevant, that she had paid the value to other creditors before interpellation by her present party, tho' she had paid without sentence. Stair,

Stair, 15. June 1681, Baird.—Yet an executor-nominate, having expended the little free gear in the deceased's testament, that remained over the expence of his funerals, upon the education of his younger children, in respect no debts appeared; and many years thereafter, being sued by a creditor of the deceased's, who insisted, that the children could have no claim, whether as legitim or dead's part, *nisi deductis debitis*, and that the executor ought to have exacted *cautio mutiana*, at least, ought not to have paid without decree. The Lords decerned against the executor, tho' the children were insolvent. *Harc. (Executory)* Jan. 1685, Ross.

THE executor, who paid the debt without decree, was allowed to come in *pari passu* with the other creditors, doing diligence. *Can he state a debt paid without sentence pro rata?*
Dur. 16. June 1637, Anderson.—But this was afterwards refused to the executor, and the debt totally rejected.

Dirl. 8. June 1677, Patrick.

THE executor is in safety to pay privileged debts, and debts given up by the deceased in his testament, without a sentence. *Had. May pay privileged debts, without sentence.*
5. Dec. 1609, Leith. Stair, Gosf. 7. June 1677, Andrew.—And may pay servants fees, and funeral charges, upon a simple receipt, and such payment will exoner. *Home, Feb. 1683, Littlejohn.*

A LEGATOR, suing the executor, at the distance of more than ten years after the deceased's death, the Lords found no necessity for the legator to find caution to free the executor at the creditors hands, seeing the legator's decree was sufficient warrant to the executor. *Must pay primo venienti.*
Auch. (Legacy) 29. March 1627, Craigmillar.

AFTER intenting action against the executor, he is not at liberty to prefer another creditor, and if he make payment to another creditor, even after decree recovered against him, it will be no exoneration: and therefore, if there is not sufficient to answer both, he ought to raise a multiple-poiding. *After interpellation by one creditor, cannot pay to another, even upon decree, but ought to raise a multiple-poiding.*
Dur. Spot. *(Executor)* Auch. *(Executor)* 16. Dec. 1629, White. Dur. 5. Dec.

1626, Jeffray. Spot. (*Executor*) 2. Dec. 1628, Lyle.
—The same found, tho' the debt paid was acknowledged by the deceased in his testament. Dur. ult. March 1624, Curriehill.

A CREDITOR of the deceased having arrested in the executor's hand, which he could not regularly do after his debtor's decease, yet this was found a sufficient notification of the debt, and interpellation, after which the executor was not at liberty to prefer others. Dur. 14. June 1625, Conpar.—But tho' the executor so far acknowledge a creditor as to make a partial payment, this was not found to bar him from making payment to other creditors, and exhausting the testament thereby. Spot. (*Executor*) Dur. 16. July 1629, Telfer. Found, That an executor cannot pay, even upon lawful sentences, in prejudice of debts given up as due by the deceased in his testament; but that he ought to exoner himself, by raising a multiple-poiding. Nicolson, (*Exoneration*) 28. March 1621, Scougal. Dur. Spot. (*Executor*) 8. March 1631, Duff.

GOODS, confirmed in a testament, may be proved by witnesses to be *male appretiated*, at the instance of an executor *ad male appretiated*, notwithstanding of the oath given as to the value by the principal executor in the confirmation, that being only an oath of credulity. Harc. (*Executry*) March 1683, Hasellside.
—A principal executor was found obliged, at the instance of an executor *ad omitta et male appretiated*, to give his oath, both upon subjects omitted, and upon the wrong appretiation of these confirmed: for, tho' he had formerly deponed, further subjects might have since come to his knowledge; and as for the values put upon subjects in a confirmation, they are but conjectural, and the executor may come thereafter to a more exact knowledge of the values. Stair, 18. July 1667, Ker.—The estimation put upon the goods by the testator himself must be the rule; in which case, there is no place for an executor *ad male appretiated*

appretiated. Gosf. 2. Feb. 1672, Martin.—The same must be the rule in computing with creditors, who will not be allowed to prove a higher value, unless the lession be enorm, as if the deceased had apprised the goods within a half of the true avail. Stair, 1. Feb. 1662, Bel-sches.—He who is cautioner for an executor, in confirmation of a testament, will not only be decerned to make the goods and gear confirmed forthcoming to the creditors, at the prices confirmed in the testament, but also for other great prices, if the goods be decerned to be of greater value than the prices confirmed. Had. 19. July 1610. Paterfson.—In a suit, for a coffer, at the executor's instance, who had confirmed the same at a certain value, the defender offered to pay the said value, and insisted, that if the executor alledge it to be worth more, he must add the same to the testament. The Lords sustained process, and found the executor needed not add the greater price to the testament, until the coffer was exhibited, that he might know at what further value the same should be confirmed. Dur. 24. Nov. 1627, Gourlay.—An executrix was found liable to accompt for the goods, corns, and others, at the values given up in the confirmed testament, tho' the corns did not amount to what they were given up at; and the goods were truly sold at less prices, tho', at the time of the confirmation, she had protested only to be liable for the prices she should get for them; and tho', after the confirmation, they were apprised at less by unsuspected witnesses. Dur. 10. March 1632, Ludquharn.—The inventory given up by the executor, must be the rule of the charge, unless he prove, that it was given up at random, and was truly less. Fount. 7. Feb. 1679, Pearson.—An executor is but a trustee, and must not only hold compt for the principal sums confirmed, but also for annual rents arising due after confirmation, before uplifting; whereby the legators came to get payment, tho', at the date of the confirmation, the inventory was no more than sufficient to pay the debts. Home, Jan. 1721, Rae.

AN executor being a trustee, if he transact any debts due by the deceased, cannot take the benefit of the cases to himself, but the same must accresce to the creditors

Bound to communicate cases.

and others to whom he must accompt; and so cannot discharge himself with more than the sums truly paid, Fount. 15. July 1709, Farquhar. Forb. 16. Fount 19. Dec. 1710. Elphington.

IN a process against an executor, it will not be sustained as a defence, that decrees are already taken against him to the extent of the inventory, unless he has also made payment conform. The creditor will be allowed to take his decree, and make the best of it in competing with other creditors. Nor does the executor suffer; he has a remedy, by suspending upon multiple-poinning, when diligence is raised upon the decree. Dur. 8. July 1634, Preston.

If an executor die before obtaining sentence, there is place for an executor ad non executa.

Diligence raised by the principal executor, will it accresce to the executor ad non executa?

AN executor is but a trustee, and if he die before executing the testament, by obtaining decrees in his own name, his trust-right must die with him; and there must be a new confirmation, as if the former had never been. Fount. 29. Nov. 1677. Isbrand, &c.

UPON which footing, an executor confirmed having raised process, and taken out an act of liti-contestation against a debtor of the deceased's, and thereafter dying *pendente lite*, it was found, That his executor could not obtain transference of this action, because he had died before the testament was executed; neither could he obtain it, as executor to the first deceased, because the action was not intended at his instance; so that the action was lost, and the pursuer behoved to intent one *de novo*, as executor to the first deceased. Dur. 40. Feb. 1627, Lennox.—An executor-creditor, decerned but not confirmed, having taken a licence to sue and execute an inhibition upon the depending process, tho' his office fell (as he died before confirmation,) yet the diligence, done by him, was found effectual to be taken up and followed forth by the next executor, who should make up titles to the subject; for

inhibition

inhibition, once *rite* led, becomes a real accessory of the debt, and must go along with it, to whomsoever conveyed. Fount. Dalr. 24. Dec. 1703, Carnwath. But it would appear, that this has been afterwards altered. Forb. 30. June 1705, *inter eosd.*—And if the executor has granted assignation of any of the subjects confirmed, the assignation must fall of course by his death, unless sentence be recovered. Harc. (*Executry*) 16. Feb. 1682. Somervell.

A CO-EXECUTOR dying before sentence, the office accretes to the surviving executor. Bal. (*Executor*) 14. March 1548, *What if there* Culross. Dur. Spot. (*Executor*) 23. *be a co-execu-* July 1625, Aitken. Fount. 6. Dec. *tor?* 1693, Beek.—The like, where the co-executor, by decree of the commissaries, was secluded from the office. Dur. 26. June 1629, Young.

IT was found, That a testament is to be reckoned as executed, and no place for a *non executata*, when a decree is recovered against the debtors, tho' the executor die before he get payment. And the reason is, that possibly the executor has raised diligence upon his decrees, and denounced the debtors, upon which annualrent is due; and possibly he has also gone on to comprize the debtor's lands; and it would be absurd, that all these diligences should vanish, which behoved to be the case, if there were place for a confirmation *ad non executata*, seeing the decrees and diligences could not be transferred or settled in the person of the executor *ad non executata*, who represents the deceased only, and not the executor, at whose instance the decrees are obtained. Dirl. 16. Nov. 1666, Reid. Stair, Newb. 17. Nov. 1666, Downy. Gosf. 21. Nov. 1671, Collinson.—Two executors having obtained decree against a debtor of the deceased, the one executor dying, the other charged for the whole; which the Lords sustained, seeing the testament was executed by a sentence; in which case, the other executor's representatives needed not be called. Stair, 25. Jan. 1665, Menzies.—The contrary afterwards found, and the deceased executor's half, determined to belong to his executors, and not to accrete to his co-executor, tho' they

If the executor die after obtaining sentence?

were *conjuncti*, both in the office and in the decree. Stair, 22. June 1671, Gordon.

AN executor is a trustee, and when he takes decree against a debtor, it is still *qua* trustee; upon which footing, while the deceased's effects are *in medio* unlifted, his nearest of kin, creditors, &c. will still be preferable to those deriving right from the executor. Thus, an executor having taken decree in his own name against the deceased's debtor, and then dying without uplifting, in a

competition between a donatar of his single escheat and the nearest of kin of the first deceased; the Lords preferred the nearest of kin; for tho', by taking decree, the right is so far established in the executor's person, that the office will transmit to his representatives; yet, *quoad* the property, it is no more his after decree than before. Stair, Gosf. 21. Dec. 1671, Gordon.

AN executor, *qua* nearest of kin, confirming, is in a different case from a simple executor.

Confirmation of an executor *qua* nearest of kin, is a complete title, and no place for a non *executa*, tho' he die before execution.

A trust-right, or procuratory granted for the behoof of others, must die with the trustee. It is otherwise, where the procuratory is *in rem suam*, which is the case of the executor, *qua* nearest of kin. A confirmation of an executor, *qua* nearest of kin, is nothing else but a legal procuratory or assignation, with the burden of debts, granted by the law, which never dies; which being *in rem suam*, may be followed forth as a *jus quasitum* by the executor's representatives or assignees. And, as the law never gives a second assignation while a prior is in force, there can be no place in this case for an executor *ad non executa*, tho' the nearest of kin should die before obtaining sentence. 24. June 1737, Mitchell. See Harc. (*Executry*) 6. Nov. 1686, Graham.

THE third of dead's part due by the act 14. parl. 1617, for executing the office, is only

At 1617, & nent retention of the third.

competent to stranger executors nominate, not to executors-dative, *qua* nearest of kin. Stair, 28. Nov. 1676, Ker.—A relict, being executrix-nominate,

date, has no right to a third of the dead's part. Fount. 26. Dec. 1704, Robertsons.—The like; Harc. (*Executory*) 27. Jan. 1688, Inchdarny.—The contrary was found, Nicolson; (*Dead's part*) 6. Dec. 1632 Douglas.—Stranger executors have a third of the dead's part for executing the testament; but this is only in case there be so much free, all debts and legacies being deduced. Dur. 29. Nov. 1626; Forsyth. Dur. 9. July 1631, Wilton. Stair, Gosh. 15. Jan. 1674, Paton. Stair, 25. Jan. 1681, Bathgate.

A MAN having left a stranger executor and universal legatar, in a process against him, at the instance of the nearest of kin, the Lords found the whole gear to belong to the defender, without any deduction, notwithstanding the act of parliament 1617, which was found not to debar any person from leaving his effects to any person he pleased. Dur. 15. July 1636, Oliphant.—An executor cannot have both a third of the confirmed testament, and his legacy besides, but may chuse the most beneficial. Fount. 25. Jan. 1681, Legataries of Arnot.

AN executor is not chargeable with particulars not contained in the inventory, nor introduced with. Falc. vol. I. p. 29. Dun, *Later decisions*. 18. Dec. 1744.

EXECUTORS-nominate, having laboured and sown the deceased's farm, were found liable to the universal legatar for the profits. Falc. vol. I. p. 232. Tait, 28. Feb. 1747.

PAYMENT, made by an executor, without decree, was sustained to exhaust the inventory, on particular circumstances. Falc. vol. I. p. 129. Simson, 4. June 1746.

THE executor may, after elapsing of six months after the deceased's death, use the right of retention, which was competent to him by the former practice, as to all debts due by the deceased to himself, which will be equally available to him as if he had obtained decree, and consequently will found him in a preference, before all creditors who have used no diligence within that period, tho' they should immediately after sue for their debts. Falc. vol. I. p. 33. Rem. Dec. p. 98. Crichton, 22. Dec. 1744.

AN executor-creditor, like an executor-dative, being a trustee only, is not liable to the risk of goods perishing

or falling in their appraised values, but is bound to dispose upon them by auction, and to account for the price. Rem. Dec. p. 263. Stewart, &c. 16. July 1757.

COMMISSARIES are obliged to give out confirmations of a part of the deceased's effects, if the nearest of kin apply for them, and cannot insist that full inventories be made up. Fac. Col. vol. I. p. 131. Brodies, 10. Aug. 1753.

GENERAL disponees, tho' not named executors, are entitled to the office of executor, preferable to the deceased's nearest of kin. Fac. Col. vol. I. p. 183. Crawford, 10. Jan. 1755.

A BOND of provision, granted by a brother to a sister, and bearing to be in full satisfaction to her of all claim of executry, found in the hands of the brother's doer, after his death, does not exclude the sister from being confirmed executrix, *qua* nearest of kin. Fac. Col. vol. 3. p. 216. Home, 6. Aug. 1762.

EXECUTORS, *if they can sue, or be sued separately?* See *Solidum et pro rata*.

IN *what cases liable for annualrent?* See *Annualrent*.

WHO *is executor qua nearest of kin?* See *Succession*.

DILIGENCE *prestable by executors.* See *Diligence*.

EXECUTOR's oath, *if good against creditors?* See *Proof*.

EXECUTOR *may pay himself in the first place.* See *Payment*.

CREDITORS *have a direct action against the intromitter with goods left out of the inventory, without necessity of confirming ad omnia.* See *Service and Confirmation*.

EXECUTOR-CREDITOR.

Title of confirmation.

A N heir, having made himself liable to his predecessor's debt, by entering, the creditors, tho' they recovered no decree against him upon the passive titles, were found sufficiently entitled upon their simple grounds of debt, to confirm executors-creditors to him after his decease. Forb. 26. Dec. 1705, Dickie.

IN

IN a question, If a creditor, having an heritable bond whereon he is infest, may seek to be confirmed executor-creditor to his deceased debtor, the reason for the affirmative was, That he had in his bond an obligation to pay, and he had action against the executors in his option, as well as against the heir; *ergo* he might be executor. But the Lords thought, that if a creditor on an heritable bond sought the office, he was not preferable, because an heritable debt cannot be the subject of confirmation *passive*, *ergo nec active*. Fount. 17. Dec. 1686.

If an heritable bond can be the foundation of a confirmation?

AN executor-creditor is but a trustee, as well as a simple executor; but then he is a trustee principally for his own behoof. The law, which never dies, gives him a procuratory *in rem suam*, which is not a simple trust to die with himself, but may be followed forth by his representatives as a *jus quasitum*: and, as a decerniture and confirmation is truly an assignation to the subjects confirmed, in security and payment of his debt, there can be no place for a new assignation or confirmation *ad non-executa*, tho' he die before sentence. 24. June 1737, Mitchell.

Tho' an executor-creditor die before sentence, no place for a non-executa.

AN executor-creditor must do diligence. See Diligence.

EXECUTRY.

IT was found, That provisions, made in favor of the children of a first marriage, is a debt affecting the deceased's whole goods, as any other debt does, and that it ought not to be taken off the two thirds of the moveables to make the second wife's third free thereof, but that it ought to be taken off the whole *in cumulo*. Dur. 17. Nov. 1638, Fraser.—A clause of conquest, in a contract of marriage, in favor of the children of the marriage, must come off the whole head: and therefore,

What debts affect the whole head, what the dead's part only?

therefore, a second wife, insisting for her legal third, was found entitled only to the third of the surplus, after deduction of the conquest, during the first marriage. Stair, 25. Jan. 1671, Sandilands. Stair, 19. June 1678, Dickson. June 1729, Stewart.—A bond of provision delivered *in liege poustie*, like other debts, comes off the whole head of executry. Stair, 16. July 1678, Murray.

IT was found, That funeral-expences, alimēt of the deceased's family till the next term after his decease, the expence of confirming his testament, and his relict's mournings, affect not only the dead's part, but come off the whole head of the executry; all these being considered as the deceased debts, but that the charges of building a monument to him, by warrant of his testamentary deed, must come off the dead's part only. Forb. 20. June 1713, Monerief, &c.

WHAT is reckoned executry, with relation to the children? See *Heritable and moveable*.

WHAT with relation to the wife? See *Husband and wife*.

PARTITION of executry among wife, children, and dead's part. See *Legitim*.

E X E R C I T O R.

THE freighters of a ship having trusted the master with a sum of money, as a stock-purse, for buying goods at the port for which he was freighted, and the master having run away with the money, the owners also being hereupon pursued, not only *exercitoria actione*, but upon the edict *nauta, caupones, stabularii*, in regard that money used to be carried to that port as a *corpus*, rather than a quantity; the Lords, in regard the master's receipt carried not such a number of pieces, but a neat sum, with an obligation to be accountable at meeting, found, That his receipt did not bind the owners, since the freighters followed the master's faith, and it did not appear, that he was *hujus negotio praepositus* by the owners; and therefore assilized the exercitors or owners. Forb. 12. Fount. 16. Dec. 1707, Coltran.—Constituents found liable to pay money borrowed by their supercargo, tho' neither did his commission

mission bear any exprefs power to borrow money, nor was it applied to their behoof. 23. July 1732, Rogers.

EXHIBITION.

ONE deriving right to lands from an apparent heir, who died in the state of apparency, insisted in an exhibition of the title-deeds of the estate: objected, That he had no right to the lands, nor consequently to the title-deeds. The Lords found the pursuer had no title to demand exhibition of rights granted to the predecessors of his author, the apparent heir. 19. June 1734, Campbell.—The Lords allowed inspection of the vassal's retours to the donatar of ward, to the end he might know what lands held ward. Gilm. 7. Stair, 20. Dec. 1661, Rothés.—An incident was allowed in an improbation for production of many mens writs, which the pursuer had no other interest in, than to make a *comparatio literarum* with the writ challenged, as forged. Had. 4. July 1623, Home.—In an exhibition of a contract of marriage, to which the pursuer was not a party, found he behoved to condescend on the particular clauses in the contract made in his favor. Hope, (*Exhibition*) 16. Dec. 1626, Crawford.—A wife and children of a marriage, insisting in an exhibition of all writs in the defender's hands, granted by the deceased husband, in prejudice of their contract of marriage; the Lords thought, that tho' all methods are to be encouraged to detect and punish fraud, yet the same must be done in a regular way, without subverting our known forms: therefore they found, in this case of personal creditors not having affected the subject, That they could call for no writs but what were conceived in their own favor, or to their behoof. Fount. 25. Nov. 1707, Kinaldy.

NO person can have action to compel a party to exhibit writs, to found an action against himself, *quia nemo debet edere instrumenta contra se*. Had. 10. Feb. 1623, Monteith.—In a process of compt and reckoning, between the representatives of two brothers, the pursuer insisted, that the defender should

Who have interest to sue exhibition?

If one is bound edere instrumenta contra se.

should produce his father's compt-book, in order to fix a charge against him, who accepted *nemo tenetur edere instrumenta contra se ad fundandam litem*; and that the form of process was, for the pursuer to give in a particular charge; and litiſcontestation being made thereupon, he might crave exhibition of the compt-book, or other writings, *per modum probationis*. Answered, The two brothers were in a co-partnery; and besides, one brother was factor for the other, which gives the pursuers an interest to call for the compt-book as their proper evident. The Lords ordained the book to be put in the hands of the Lord Auditor; and if, by inspection, he found any co-partnery, or factor accompts. he should produce the same to the pursuers, even *ad fundandam litem*, otherwise that the same should be given back and not shown. Stair, 7. July 1668, Paton.

EXHIBITION, at the instance of a bankrupt's creditors against his mother, is competent for exhibition of all writings belonging to him in her custody, tho' no particular writings be condescended on.

General conclusion of all writs. Dur. 25. Feb. 1637, Hepburn.—In a reduction and im-probation of certain land-rights, the defender produced charter and sasine, sufficient, with forty years possession, to exclude the pursuer: the pursuer took out a diligence in general to prove interruptions, and having executed the same against the defender himself, the Lords found, That he was not obliged to depone, unless a special condescendence were given of writs called for to be exhibited. 26. June 1735, Scot; and they afterwards refused to oblige the defender to produce an inventory of his writings, particularly condescended on by the pursuer. 13. Jan. 1736, *inter eosd.*

IN an action of exhibition of evidents, the Lords found this exception relevant, *viz.* That before the charge, being a common evident, it was delivered to one of the

Who liable to exhibit? colleagues. Hope, (*Exhibition*) 1. Feb. 1620, Murray.—When the haver of writs is called by an incident diligence, it is not sufficient to libel and prove that he had the writs some time or other, but it is necessary to prove, he had them since intenting the cause; and if it is only alledged he had them before, it is further

ther necessary to prove, that he fraudulently put them away. Dur. 17. Nov. 1627, Inglis.—In an incident diligence against havers of writs, a party was only found obliged to depone, if he had any of the writs after citation, or if he fraudulently put away the same before citation, *quia pro possessore habetur qui dolo desit possidere*: but it was found, that he ought not to be examined upon his knowledge, in whose possession the same were. Stair, 14. Nov. 1662, Creditors of Bryson.—A party being sued for exhibition and delivery of writs, it was not found sufficient, that these writs were once in his possession; because writs pass from hand to hand, and it is not usual to take receipts for them: and therefore it was only found probable by the defender's oath, what had become of the writs in question; and this, tho' it was instructed that he had granted receipt, and obligation for redelivery to a third party; which it was found, the pursuer could not build upon, having no right to that obligation. Stair, 31. Jan. 1678, Tailzifer.

IN an exhibition, the Lords repelled an exception, founded upon an assignation and intimation of the bond, craved to be exhibited, and ordained it to be exhibited, reserving against the delivery.

Exceptions reserved against delivery.

Hope, (*Exhibition*) 7. Feb. 1622.—

This again found, where the assignee was dead, but if he had been alive, the Lords declared they would have refused to bind him to exhibit. Hope, (*Exhibition*) Wihart.—In an exhibition of a bond, as belonging to the pursuer, the defence was repelled, That it was assigned in the defender's hand, as not being relevant against the exhibition. Had. 26. June 1623.—The like; Auch. (*Exhibition*) 21. Feb. 1628, Howat.

A BOND being called for in an exhibition, as being unlawfully taken from the pursuer; it having been in his possession as his proper evident; the Lords refused to allow the defender to dispute its validity, but sustained the summons for redelivery, reserving to the defender his defences against it when sued. Had. 23. Jan. 1610, Stewart.

Spoliatus ante omnia restituendus.

Exhibition

Exhibition ad deliberandum.

Competent to all sorts of heirs. AN apparent heir of conquest may sue exhibition *ad deliberandum*. Colv. Dec. 1588, Pitcairn. 'Tis competent to an apparent heir of provision. Falc. 25. Feb. 1684, Scot.—And to all kinds of heirs, male, and of tailzie, as well as heirs of line. Forb. MS. 10. Feb. 1714, Crawford.

Competent after annus deliberandi. EXHIBITION *ad deliberandum*, may be sued after the *annus deliberandi*. Dur. 1. July 1626, Nisbet.

If behaviour bars this privilege?

THO' an apparent heir made up titles by an adjudication upon her own bond, yet this was found not to take away her privilege of an exhibition *ad deliberandum*; for she refused that she had possessed thereon: and it was pled for her, That, *esto* she had, it would infer no passive title; and as she might be forced by other creditors to purge the estate of that debt, it was reasonable she should have the privilege of deliberating, whether it was safe to enter heir. Stair, Gosf. 8. Jan. 1675, Waird.

GESTIO pro herede, was found to be no bar against an apparent heir, suing exhibition *ad deliberandum*. Bruce, 30. June 1715, Spark. Forb. MS. 10. Feb. 1714, Crawford.

If renunciation bars it? RENUNCIATION to be heir, in favor of one creditor, does not hinder the heir, afterwards resolving to enter, to sue an exhibition *ad deliberandum* against another. Stair, 8. Jan. 1675, Waird.

—An adjudication, being led *contra hereditatem jacentem* upon the apparent heir's renunciation, it was argueth, That the apparent heir, afterwards resolving to enter, could not have exhibition *ad deliberandum* against the adjudger, because the renunciation was a virtual approbation of the adjudger's diligence. Answered, There is no presumption, when one renounces, that he does it in any other view than to save himself from being liable,

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able; and when he afterwards proposes to enter, there is the same reason he have an exhibition *ad deliberandum* against the adjudger, as against any other. The Lords refused the action *ad deliberandum* in this case.

Jan. 1721, Richardson.

AN heir was found to have right to call for the writs of his predecessor's lands, tho' the predecessor had resigned the same for new infestment in favor of the defender; for seeing infestment was not expedite, the heir, who might still enter to the lands, must be indulged his ordinary privilege. Dur. 15. Feb. 1632, Ayton.—The contrary; Harc. (*Exhibition*) March 1683, Yester.—The writs of the predecessor's lands being called for in an exhibition, and the defender producing some expired comprisings for small sums, to show that the deceased was denuded, and it being alledged, that they were satisfied by possession within the legal; the Lords ordained the defender, *ante omnia*, to exhibit the writs, reserving all defences against delivery. Gilm. 12. Jan. 1665, Steil.—The debtor, against whom an apprising is led, having ratified the same by a deed under his hand, this was found sufficient to bar the debtor's apparent heir from suing an exhibition of the apprising *ad deliberandum*. Bruce, MS. 11. July 1716, Rutherford.—A tutor having renounced a wadset-right, in which his pupil was apparent heir, without waiting to be compelled by an order of redemption, exhibition was therefore allowed to the apparent heir, of the wadset-right, and the pursuer's right to the wadset was not found so clearly sopite by the tutor's renunciation, as to bar her from her privilege of deliberating. Forb. 19. June 1712, Dick.—The Lords sustained this defence against an exhibition *ad deliberandum*, That the deceased had disposed the fee of the subject irredeemably, and so the pursuer had no interest, altho' he alledged it was done on death-bed, the reduction whereof was reserved to him. Fount. 7. Feb. 1680, Bruce.—An alledgeance, founded on an expired comprising, against the brother of the pursuer, was found not sufficient to exclude an exhibition *ad deliberandum*, as apparent heir to his father and grandfather, and other predecessors.

Has no interest to call for writs of lands whereof the deceased was denuded.

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unless the comprising had been led against the brother as heir, or lawfully charged to enter heir to his predecessors. Home, Jan. 1685, Fintry, &c.

THE Lords found the defender not obliged to depone upon his knowledge, where papers called for were, or in whose hands they had been since the deceased's death, but in the common terms of an exhibition, if the defender had; or has, or fraudulently put away any papers since and before intenting of the cause. Home, Fount. 3. Dec. 1685, Yester.

EXHIBITION found relevant of all writs granted to the deceased. Stair, 6. Dec. 1661, Tailfer.

EXHIBITION sustained of all deeds granted by the deceased, to whatever person, which were in his possession at the time of his death. Stair, 29. Nov. 1667, Pringle.

ACTION for exhibition *ad deliberandum*, sustained of all obligations made by the deceased to the defender, a stranger. Dur. Spot. (*Exhibition*) 26. Feb. 1633, Swinton.—Exhibition found relevant of all writs granted by the deceased to his wife, children, or other persons being in his family at the time of his death, and upon which no infestment had followed; but was refused, as to writs granted to strangers. Gilm. 19. Nov. Stair, 6. Dec. 1661, Tailfer. Stair, 22. Dec. 1675, Maxwell. Fount. Dalr. Forb. 16. Jan. 1706, Buchanan. But thereafter the defenders, tho' strangers, were ordained to exhibit all writs in their hands, granted to, or by the pursuer's predecessors. Bruce, 30. June 1715, Spark.

EXHIBITION refused of writs, whereupon infestment has past; for as to these, the records, it was thought, may give as much light as was sufficient to deliberate. Stair, 6. Dec. 1661, Tailfer.—For the same reason it was found a good defence against exhibition, that the writs called for were registred in the session-books, the defender giving in a condescendence of the dates of registration. But the defence was not sustained as to writs recorded in the books of chancery, or in the books of inferior courts. Fount. 23. Dec. 1707, Pringles.—Thereafter it was found, that the defenders must

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must exhibit all writs in their hands, whether infestment has followed or not. Bruce, 30. June 1715, Spark.

EXHIBITION is the proper conclusion of this process, but not delivery, which an heir cannot insist for, without being served. *No conclusion for delivery.* Dur. 1. July 1626, Nisbet.

IT was found, That an apparent heir may sue an intromitter with his predecessor's estate to account; that, upon a view how the balance stood, he might determine to enter heir or not. *Nor for compt and reckoning.* Dur.

16. March 1637, Home.—But thereafter, the Lords refused to sustain the summons for compt and reckoning, but only for exhibition; and upon this ground, that no party should be troubled to compt where the action cannot produce an exoneration. Gosh. 7, Dec. 1669, Hog. Stair, 22. June 1671, Leslies.

EXPENCES.

THE executor having followed out a process begun by the deceased, and at last succumbed, did afterwards, in a compt and reckoning with the legators, state the expences of that process as an article of discharge, to come off the whole head. *Expences laid out in re comuni.* The legators contended, That there was free gear sufficient to answer all the debts and legacies; and as the executor himself was residuary legator, the benefit of the process would have entirely accrued to him, and he only ought to bear the expences. Answered, That it is the executor's duty to execute the testament, and to follow forth every probable ground of plea; that the expences of administration is a debt that must affect the whole subject, and no particular party's interest is considered in *re-communi*, till that subject come to be divided. The Lords found, That the expences must be defrayed out of the executry, and come off the whole head; by which the expences of process and other acts of administration, land entirely upon the person who

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draws

draws in the last place. Dirl. 4. June 1674, Bogle. See Gosf. 5. Stair, 6. June 1674, Law, who observe this decision as if this process had been found to be entirely upon the risque of the executor.

THE donatary to a gift of bastardy, being sued by the bastard's creditors, got allowance of all expences bestowed for the gift, and in suing of debtors. Gosf. 20. Nov. 1674, Somervell.

AN executor-creditor, computing with other creditors, for his intromissions, the expences of confirmation may be deduced by him from the whole head, in terms of the act of sederunt. 28. Feb. 1662. Fount. 2. Jan. 1708, Ramslay.

THE expences of ranking and sale, found to come off the whole head, *tanquam precipuum*, and that the preferable creditors should suffer no defalcation, tho' the practice had been otherwise. Fount. Dalr. 16. Jan. 1702, Creditors of Pitencrief.—See act of sederunt, 23. Nov. 1711, § *ult.* where it is appointed, that the expences of ranking and sale must be proportioned amongst the creditors, according to the shares they draw of the price. And it being questioned with regard to a bond of provision, ranked *ultimo loco*, as being reducible upon act 1621, whether the child could draw any part, until the preferable creditors were fully paid up? it was found, That the act of sederunt is equally applicable to all sorts of creditors. Home, 25. July 1718, Creditors of Auchinvole.—Upon a bankrupt estate, there were three classes of creditors; 1^{mo}, The preferable creditors, who were instantly to draw their whole debts out of the price. 2^{do}, The creditors in annuities for life, who were to draw yearly the annualrents of a part of the price, left for that end in the purchaser's hands. 3^{do}, The other creditors, who, upon termination of the liferents, were to draw the principal sum. It was contended with regard to the expences of the ranking and sale, That the method of proportioning the same, founded in the act of sederunt, and followed in practice, is, that the whole expence be paid by the purchaser in the first place; a proportion whereof to be detained from the preferable creditors drawing their payments; and, as to the remainder, the interest to be deduced yearly from the liferenters, and the principal from

from the creditors, when the liferents run out. Notwithstanding of which, the Lords ordained the expences of the ranking and sale to be proportioned on the haill creditors, who are now, and at the event of the liferenter's death, to draw the price, and that a deduction be made accordingly. And further, in regard there could be no retention till that time off the creditors, who only draw their payment at the death of the liferenters, therefore ordained the proportional expence which falls to their share, *pro loco et tempore*, to be also further proportioned on these creditors who now draw payment; and ordained the same to be retained accordingly; and also ordained the purchaser to repay them the said sums, without annuallrent, at the first term of Whitunday or Martinmas, after the death of the liferenters, and to detain the same from the creditors entitled to draw the price liferented. July 1727, Creditors of Abotshall.

IN a sale, carried on by an apparent heir, if there be no reversion, the expence must be proportioned among the creditors in terms of the act of sederunt 1711, being in that case, *in rem versum* of the creditors, and not of the heir. 3. Feb. 1738, Nicolson.

THE Lords refused a tenant his expences, in suspending on a multiple-poinning against his master's creditors; but reserved him action or retention against the master himself, in the following years tack-duty. Fount. 19. June 1703, Anderson.

—A debtor, suspending upon double distress, is entitled to retain his expences out of the subject; but, in the present case, the debtor having betrayed some anxiety to stave off the creditors, he was refused expences *in panam* of litigiousity. Fount. 20. June 1707, Kier. — A Lord's factor is entitled to his expences of plea in fitting accompts, and obtaining decree of exoneration. Home, Feb. 1687, Smith.

A MAN having uplifted a sum for another, who intrusted him to do so, and being sued, first denying the trust, and that being made out by witnesses and other pregnant evidences, next founding on a general discharge, and it being referred to his oath, that

that this debt was neither *actum* nor *tractatum*, to be comprehended; and he, after much shifting and tergiversing, at last compearing and deponing, That it was communed upon and included, and thereupon being as-soilzied; the Lords, notwithstanding, found him liable in the pursuer's expences. Fount. 22. Feb. 1701, Smith.

EXPENCES were given in a tentative process of reduction and improbation, where the
Later decisions. defender produced a clear right to the estate. Rem. Dec. p. 46. Cumming,

12. July 1742.

A HUSBAND is liable for the expence of a successful declarator of marriage against himself. Special costs, given in such case, do not bar the wife's agent from recovering the whole money laid out by him. Fac. Col. vol. III. p. 219. Agent for M'Alister, 18. Nov. 1762.

F A C T O R.

Factory, when irrevocable. **A KIRKMAN** having granted a factory for the factor's life, to uplift some bolls of victual, with a certain number of them to himself for his pains; the Lords found, That the kirkman, setting afterwards the said bolls in tack, did not prejudice the factor of his salary, because such a factory, *ubi merces intervepit*, approaches nearer to the nature of *locatio* than *mandatum*. C6lv. Feb. 1581, Stewart.—A debtor having granted assignation of maills and duties to one of his creditors, for payment of several debts due to the assignee and others, bearing to endure for thirteen years, and ay and while these debts should be paid, with allowance of L. 5 *sterling* of yearly salary; after the debtor's death, his heirs withdrew the salary, and it was found, That the factory was revocable by the granter, and fell by his death, seeing the factory was not fixed for years, as the assignation was. Bruce, 17. Dec. 1714, Drummonds.

When understood revoked. **A FACTORY** granted by a minor with consent of his curators, indefinitely, does not fall at majority, but continues until it be *de facto* recalled.

Dur. 12. Noy. 1634, Nasmith.

A WIFE

A WIFE, who had a general factory, with a special clause, empowering her to do every thing the husband himself might do, *Factor's power* &c. disposing some goods to another *cr.*

person, and owning him to be creditor to her husband; the Lords, nevertheless, found the disposition null, unless the disponent could qualify how the husband was his debtor; in respect the wife's factory, tho' it might be interpreted in the most extensive shape as to acts of administration, could not carry a power gratuitously to alienate. Dur. 13. June 1628,

Purves.——A factor, being ordered to cause make a cistern of L. 500 Sterling value, and he giving up L. 573, which was *ultra finis mandati*; yet the Lords allowed this article, because 'tis scarce possible for a craftsman to frame a piece of work exactly to the weight bespoke.

Fount. 1. July 1712; Buccleugh.——The Lords refused to allow a factor, put upon an estate by themselves, to remove tenants who had taken tacks from him for a year, and obliged themselves, by a clause in the tack, to remove without warning, they having punctually paid their rent, and offered more rent than was to have been paid by the persons he would have put in their room, and being abundantly solvent. Forb. MS. 23. July 1714; Edgar.

A FACTOR appointed by the Lords upon an estate, not bankrupt, but only sequestered, till the claims of two pretenders to the property were discussed; is, nevertheless, *All of sederunt*, bound to observe the regulations set down in the act of sederunt, 22. Nov. 1711; and the factor contravening the same, was, by their Lordships, removed, altho' the act only refers to factors on bankrupt estates. Bruce, MS. 6. July 1716, Home.

FACTOR, who had no written factory, found entitled to a salary, tho' none was pactioned. Fount. 1. July 1712, Buccleugh. *Factor entitled to a salary.* The like; Bruce, 8. Feb. 1715, Children of Smith.

THE Lords refused to allow any factor-fee to the factor on a bankrupt estate; because he had been negligent, and had given up in his accompts, some articles as *Factor malversing.*

rests

rents which had been paid to him; since, to allow him a salary, would encourage factors to endeavour to wrong their constituents. Forb. 22. June 1711, Heriot.

IN a compt and reckoning, the price of the victuals intromitted with by one of the parties,

At what period being decerned to bear interest; the chargeable with the price of victual sold? the next question was, At what period the price must be presumed to have been received, in order to fix a commencement for annual rent? It was urged, That

it ought to be considered as received at Candlemas, seeing the party was indulged the ease of the Candlemas fiars. The Lords found he could not be stated as debtor for the price sooner than Whitsunday, victual not being ordinarily sold for ready money. Fount. 16. June 1697, Bruce.

ONE who contracts *factoris nomine*, is presumed to bind his constituent only, unless the contrary be expressed; and therefore: *Factor contract- ing factoris nomine, is he personally liable?* is not personally liable to implement, but only to furnish a sufficient commission so as to bind his constituent. 17. Feb. 1738, Rankin.

A MAN, in appointing tutors to his infant heir, may also name a factor for levying the rents. *Later decisions.* Rem. Dec. p. 60. Tutors of Straiton, 11. Feb. 1743.

A FACTOR having been appointed for levying rents, but without any agreement as to his salary, the Court fixed his salary at $2\frac{1}{2}$ per cent. of the money uplifted by him. Fac. Cok vol. I. p. 61. Campbell, 6. Dec. 1752.

A QUESTION occurred, Whether a factor upon an estate, sequestrated on account of a competition between two claimants, neither of whom were infest, could remove a tenant who continues to pay the same rent that he did to the original proprietor? Pleaded for the tenant, At the favor of possession is in law very great, so no tenant in possession can be removed but by a person who has a stronger right in him, to wit, the property evidenced by an infestment. Besides, in the law of Scotland, a tack, if clothed with possession, is a real right; and therefore, added to the favor of possession, there is like-
wise

wife the favor due to a real right, which nothing but a property and a possession can remove. Founded on these principles, the law of Scotland carries the rule, That only a person *infeft* can remove, so far, that even an apparent heir cannot remove, altho' in a manner the same person with his ancestor, drawing the rents, living in the mansion-house, and with whom, at the distance of three years, creditors are in safety to contract. Any exceptions from the general rule do only tend to strengthen it. An adjudger, with a charge against the superior, may remove; but this is only because a particular statute has made a charge equivalent to an *infeftment*. A liferenter, by the courtesy, or by the terce, may remove; but this is only because, by the general concession of our law, the continuance of the possession in these cases is deemed to be a continuation of the property, which the deceased husband or wife originally had. A tacksmen may remove a sub-tacksmen, who was bound to remove; but this is only because the sub-tacksmen cannot come against the right by which he himself holds; and in a question between him and a person from whom he derives right, this last is, *quoad* him, a *quasi* proprietor. Answered, A factor, appointed by the Court of Session, ought to have all the powers of a proprietor *infeft*, to enable him to manage the estate to the best advantage; and as he acts under the authority of the supreme court, and is tied down by strict regulations, for the benefit of those who shall be found to have the preferable right, it would be absurd to control his power of setting the lands to the best advantage, on account of a maxim in law, which was calculated only to prevent intruders from removing tenants from the possession. The Lords decerned in the removing. *Fac. Col.* vol. II. p. 68. Thomson, 9. July 1757.

WHO runs the hazard of accidents, the factor or constituent? See *Periculum*.

DILIGENCE of factors. See *Diligence*.

FACTOR may assign a debt due to him by his constituent, *ante redditas rationes*. See *Compensation*. *Retention*. See *Payment*.

FIARS of the year, if the rule for computing? See *Fiars*.

LIABLE for annualrent. See *Annualrent*.

WHO

WHO names the factor upon a bankrupt estate sequestered? See *Sequestration*.

ENTITLED to his expences. See *Expences*.

BOUND to communicate cases. See *Pactum illicitum*.

FACTOR LOCO TUTORIS.

THE factor, *loco tutoris*, appointed on the Duke of Buccleugh's estate, having applied for the authority of the Court in making particular purchase of lands, the same was granted. *Fac. Col. vol. H. p. 146.* Craigie supplicant, 10. Jan. 1738.

WILLIAM SCOULAR died in October 1748. His heritable subjects descended to Alexander Scoular, his eldest son; his moveable effects divided amongst his relict and five younger children. Application was made to the Court of Session; and John Watson was appointed factor *loco tutoris*, on account of the infancy of four of the children. Mr Watson discovered, in the course of his management, that Alexander Scoular had abstracted part of his father's moveable estate, to the prejudice of the executors; and having brought an action against him before the sheriff, he acknowledged his intromission, to the extent of L. 10. Mr Watson gave up this factory; and Alexander Brown was appointed by the Court in his place, in Feb. 1754. This was done upon the application of the relict and all the children; the eldest of whom, Helen Scoular, was before this time married to Robert Hunter, who concurred in the application. Brown insisted in the process before the sheriff, against Alexander the eldest son; and a proof was taken with respect to his intromissions; in consequence of which, the sheriff found it proved, that the defender had intromitted with leather belonging to his father, to the extent of L. 10 : 15; and with lime and sand to the extent of L. 1 : 5; and with certain quantities of bark, but found no evidence as to the extent or value thereof; and with several barrels of oil, but found no proof of the value thereof. This judgment of the sheriff was brought before the Court of Session, by advocacy, when a further proof was allowed: upon which a submission was entered into by Alexander Scoular,

Scoular, on the one part, and by Alexander Brown the factor, with the special advice and consent of Anne Donaldson the relict, and of her second husband, on the other part; submitting to Mr Francis Garden all claims and demands which the executors of the deceased William Scoular, and Anne Donaldson his relict, had against Alexander, or that he might have against them, and particularly the process then depending.—The arbiter again examined Alexander Scoular, and several other witnesses; and, upon the 17. of Aug. 1757, pronounced a decree-arbitral, finding Alexander Scoular liable in L. 127, as the price and value of his intromissions, L. 52 as the expence of process, and L. 40 in name of damage and *solatium*. Alexander Scoular brought a reduction of this decree-arbitral; and the Lord Colston Ordinary “found, That Alexander Brown, “*qua factor loco tutoris*, had no power to submit any “claims competent to the pupils; and, *2dly*, That he “had no power to submit the claim competent to Helen Scoular their sister, who was major, and married, “not only at the date of the submission, but also at the “date of the factory granted to Alexander Brown.”—Pleaded for Alexander Brown, in a reclaiming petition, That a factor, *loco tutoris*, for managing the affairs of an infant, is entitled to submit, where such submission appears a prudent or rational act of administration; since it is now an established point, That a tutor may effectually submit: and tho’ a factor, *loco tutoris*, is not in every respect equal to a tutor; yet he is entitled to act *tanquam bonus paterfamilias*; tho’ in every act of administration he is answerable for the risk, if it shall turn out against the interest of the pupil. *2dly*, In this case Alexander Scoular sought and obtained this submission, when he knew the character with which the factor was vested; and therefore he is barred *personali exceptione*, from objecting to the petitioner’s title or powers, when he was satisfied to submit with him in that character: and the submission itself expressly sets forth, that Alexander Brown entered into the submission as factor. If a person contracts with a minor, he is not entitled to be relieved from his bargain, because the minor has a right *intra annos utiles* to reduce it, if to his prejudice. At any rate, Alexander Scoular can only demand caution,

tion, that he shall be kept safe from any challenge upon the part of the executors. As to the second objection to the decree-arbitral, Helen Scoular and her husband are ready to join in the discharge to Alexander. *2dly*, The act of factory was obtained upon their application, as well as that of the younger children; and therefore, the factor was authorised to act for her, as well as for the infants; and must be understood to have taken burden for her, by entering into the submission, and to be bound to procure her consent.—Answered, It has been considered as a doubtful question, How far tutors, properly authorised, whose office gives them the total administration both of the pupil's person and estate, have power to submit, so as to bind their pupils when they come to be of age, unless where the tutor takes burden upon him for them? but it can admit of no doubt, that a factor named by the Court, for the special purpose of managing the moveable effects of the deceased, can have no power to submit the claims of those for whose behoof he is appointed factor. By the sequestration, the whole moveable effects, in this case, were put into the hands of the court; and by them no power to submit was delegated to the factor. In this case, the sequestration and factory did not singly respect the interest of the infants.—The relict had her share.—The daughter of the first marriage, and her husband, had also a share: but as they could not divide with the infants till the debts were called in, they joined in the application for a sequestration and factory; but this consent could not imply any intention to authorise the factor to enter into a submission for them. As the factor exceeded his powers, by entering into the submission, and his deed could not therefore bind the children or relict, neither can Alexander Scoular be bound. Nor is this objection barred *personali exceptione*. The submission appears plainly to have been entered into upon an erroneous supposition, that the factory entitled the factor to submit; and this mistake cannot render it binding upon either party. It is of no consequence, that the children are now willing to ratify the submission. The Lords found the decree-arbitral binding upon Alexander Scoular, and remitted to the Lord Ordinary to proceed accordingly; and found Alexander Scoular liable in the expence of extracting

extracting the decree. Fac. Col. vol. II. p. 193. Brown,
17. June 1758.

FACULTY.

A HUSBAND disposed his land-estate "to his wife in life-rent, and to any of his blood relations she should think most fit to be nominate, by a writ under her hand, in fee." *Faculties that are consistent in law.*

A nomination was accordingly made after the husband's decease; and against the nominee claiming right to the estate, it was argued: *1mo*, That this was an unhabile way of transferring property; because a fiar cannot be created by the nomination of one who is no fiar. *2do*, It is contrary to the maxim, that a fee cannot be *in pendente*; and yet here is a fee conveyed, a property established, but no proprietor until the wife chuse to exercise her faculty. Answered, to the *first*, There is nothing in reason, or in law, to bar a fiar to name his successor in what shape he pleases: it is not material who names, but whether the nomination be by the authority of the fiar; and this is not more extraordinary than for one to give a mandate to sell his estate: To the *second*, The property is not transferred, until the wife interpose her nomination: In the interim, the property remains with the disposer, and after his death is in *hereditate jacente*. The Lords found, That this disposition, granted by the husband to his wife, did sufficiently enable her to nominate persons to succeed to the subjects disposed; and that, she having accordingly exercised that power, the persons named by her have right to succeed. 28. Nov. 1729, Murray.—Colonel Campbell being bound in his contract of marriage, to secure the sum of 40,000 merks, and the conquest during the marriage, to himself and spouse in conjunct-fee and life-rent, and to the children to be procreate of the marriage in fee, did, by a death-bed deed, settle all upon his eldest son, burdened with certain provisions to his younger children, to take place in case their mother should give up her claim to the life-rent of the conquest, and restrict herself to a lesser jointure; otherwise, these provisions to be void: in which event it was left upon the Duke of Argyle and the Earl

of Mlay, to name such provisions to the children as they should see convenient. It being objected by the younger children, upon the mother's refusal to restrict herself, That their father could not delegate his powers, and that such delegation was ineffectual, there being no compulsiture upon the referees to determine, which brings the matter to the same, as if the children were left entirely unprovided; and concluding from this, that the settlement should be voided *in totum*, and that each child should have an equal proportion as if no settlement had been made; the Lords found the power and faculty, given to the Duke of Argyle and Earl of Mlay, is lawful, and does subsist: and in respect these referees have neither exercised their power, nor declared their will, not to exercise the same; they superseded further proceeding in the cause till the 5. of June next, that, in the mean time, either party might make proper application to the Duke of Argyle and Earl of Mlay, to determine what sums should be paid to the younger children, or declare their non-acceptance of the power committed to them. 16. Dec. 1738, Campbells.

ONE having resigned his estate in favor of his second son, and his heirs-male, with a clause

Import of clauses containing reserved faculties. of redemption in favor of his eldest son, and the heirs-male of his body, reserving always his own liferent, and a power or faculty "to dispoise and

"contract debt, in the same manner "as if the right had not been granted," did, thereafter, limit the said power of redemption, provided in favor of his eldest son, so that it should not be exercised, unless with the consent of certain persons named. It was objected, That the reserved faculty empowered the father to sell or contract debt, and do all acts of property beneficial or profitable to him, but not to do mere gratuitous or arbitrary deeds, such as to limit or discharge his son's right of redemption; the Lords found the father had full power to alter the succession, or to discharge the right of redemption. Fount. Forb. 2. Jan. 1706, Dundas.—A woman having first made a disposition of her whole estate to her nephew, with a power reserved to alter, in case of urgent and absolute necessity; and thereafter making a second disposition to another nephew, on a narrative, That the first had dis-
obliged

obliged her, &c. tho' it was not alledged that she was in any necessity: the Lords, in a reduction of this second, at the instance of the first, found the said first disposition revocable, and revoked by the second; and therefore reduced it, and preferred the second. Fount. 4. July 1712, Renny, &c.

AN heiress, having infest her son upon resignation, reserving to herself a faculty, to dispose a yearly annualrent out of the lands to her daughters, and having accordingly executed a charter to that effect, containing a precept of saline, but not having delivered the same to her daughters, or infest them; in a process at their instance, after their mother's decease, against their brother, to give a precept for infesting them, it was objected, That the charter was an uncompleted deed, and the faculty not exercised. The Lords found the subscribing the charter was sufficient, containing precept, whereby she was in effect denuded. Dur. penult. June 1624, Hamilton.—A father, for love and favor, having disposed his whole estate to his eldest son, reserving a power to burden the same with wadsets or annualrents, to any person not exceeding a sum named; and having thereafter granted a personal bond of provision, but without any relation to the faculty: in a suit upon the bond, against the disponees representatives, it was objected, *1mo*, The father had no power to burden the estate, otherwise than by granting wadsets or annualrent-rights: *2do*, That there was no presumption he intended to burden it, seeing at the time he had an opulent executry. Answered, to the *first*, The reserved faculty must be interpreted *benigne*, where the disposition was gratuitous, and the words *wadsets, or annualrents*, are not taxative: To the *second*, The presumption must be, that the granter designed that his daughter's provision should be secured in the most ample manner. The Lords presumed the father's will to be, That the bond should burden his executor's in the first place, and the son's estate in the second place. Stair, Dir. 21. June 1677, Hope-Pringle.—A father, having disposed lands to his children of the second marriage, reserving a faculty to contract debt and grant securities therefor, did con-

tract some personal debt, for which adjudications were led against the lands after the debtor's death. It being questioned, 1mo, Whether the simple contracting of personal debt was a sufficient exertion of the faculty, without granting real security for it: 2do, Whether adjudications for these debts could be led after the debtor's death, when his faculty was extinguished with him, and the lands not in his *hereditas jacens*; the Lords found, That the granting personal bonds was an exercise of the faculty; and that even after the death of the granter, adjudications might be led by the creditors in the bonds, against the children of the second marriage, of subjects disposed to them with the reserved faculty. 17. Jan. 1723. Competition between the creditors of Rusco and Blair.—A party, marrying an heiress, and in the contract, the estate being provided to heirs-male, with power to burden the estate with a certain sum in favor of the heirs of a second marriage; thereafter the man marrying, and in the contract binding for a sum, and obliging his heirs for the same; in a process, at the instance of the relict and son of the second marriage against the heir of the first, the Lords found the above faculty sufficiently exercised by his entering into the second contract, and providing *ut supra*; but found, that the faculty must only burden the defender *ultimo loco*, his other estate falling short. Fount. Dalr. 23. June 1698, Carnegie.—A father having disposed his estate to his eldest son in his contract of marriage, reserving to himself a power to burden the estate with a certain sum, for provisions to his younger children; this very clause was found to produce action to the younger children against their brother, tho' the father died without exercising the faculty. Gosf. 15. Feb. 1673, Graham.

IN a question, How far a reserved faculty by a father in his son's right of fee, allowing the father to burden the lands with a sum, accresced to a creditor, whose debt was contracted before that faculty; The Lords were generally clear, in the first place, That if it had been a debt subsequent to that reserved faculty or power, the contracting thereof was a presumptive exertion of the faculty, tho' not expressly mentioned

ed to be in virtue thereof; but the difficulty was with regard to an anterior creditor, that he could not lend his money on the faith of the faculty which was not in being; yet their Lordships thought it reasonable to subject these faculties to all debts, whether prior or posterior; and therefore found the faculty accresced to the anterior creditor. Fount. Dalr. 16. Dec. 1698, Elliot.

A FATHER disposing to his sons, of the second marriage, several parcels of lands, "reserving to himself full power and faculty to alter and innovate, and to contract debt, &c. as fully and freely as if the entire fee were in his person," the question occurred, If these disponees were liable to the personal debts of their father, contracted before the existence of the faculty to burden? The sons pled, That they were singular successors, and that after their dispositions their father retained sufficient fund for the payment of all his debt; so that they could neither be liable as heirs, nor upon act 1621: and further, as to the faculty to burden, whatever benefit that might afford the debts contracted after the existence of the faculty, which might be interpreted as an exercise thereof, that prior creditors could not plead upon it. It was answered, That the defenders, according to the form of their rights, are indeed singular successors; yet, from the nature of them, are liable equally, as if, in the strictest sense, they were heirs of provision: for that when a father disposes to his children, with such reserved faculties, he is not understood to have any other intention, but to save the trouble and expence of a service; and that the disponees, by acceptance, are understood to have subjected themselves personally to all the disposer's debts, so far as subjects disposed do reach; and therefore, in the eye of law, are to all intents and purposes considered as if they were heirs of provision. The Lords found the children of the second marriage liable as heirs of provision. 21. July 1724, Creditors of Rusco.—In such a case, where the disposition was to the apparent heir, it was contended for the creditors, that the son was universally liable as if he had entered

Disposition to an heir, with a power to alter, &c. makes him liable to the disposer's debts, as heir of provision.

heir; but this was not sustained, and the disponent found liable *in valorem* only. Bruce MS. 17. Dair. 18. Jan. 1717, Abercromby.

A FATHER having reserved a faculty to burden the estate with wadsets, or infeftments of annualrent, to the extent of a certain sum, and having granted a personal bond, referring expressly to the faculty; this was not found a real burden, nor effectual against a singular successor, *sciz.* a donatary of forfeiture. Gosf.

11. Stair, 12. July 1671, Learmont.—

One having disposed his estate to his eldest son, reserving a faculty “to affect or burden the same with a certain sum for provisions to his children,” the son’s creditors did diligence against the estate, and were infeft upon their apprisings: thereafter the father exercised this faculty in favor of the children, by granting them heritable bonds referring to the faculty, upon which they were also infeft. In a competition, the Lords preferred the children in virtue of the above faculty, tho’ the creditors infeftments were prior. Stair, Dirl. 6. Jan. 1677, Creditors of Mouswell. Stair, 16. Dec. 1679, Children of Mouswell.—One having purchased an estate, took the same to himself in liferent, and to his son *nominatim* in fee, with power to himself to dispose, wadset, &c. Thereafter he granted a personal bond, without relation to the faculty; upon which the creditor adjudged the estate, not only after the death of the father his debtor, but after the son was denuded, and a purchaser from him infeft. The Lords found, That the father was in effect fiar, and that the son, in effect heir, would be liable for the father’s debts *in valorem* of the subject, and therefore that creditors had access to adjudge the estate, while remaining with the son or his heirs; but found, that granting the bond in question was no exertion of the faculty, and therefore that it cannot affect singular successors. Home, Feb. 1719, Rome.—The like; Nov. 1725, Sinclair.—One disposed his estate to his eldest son, reserving to himself a faculty to burden the same with 5000 merks, in favor of whatever person he pleased; thereafter he granted personal bonds for that sum to his wife and children

children, referring to the faculty. After his decease, a competition arising between the creditors in these personal bonds, and the son's real creditors infest in the estate, the Lords found the bonds granted, in pursuance of the faculty, are only personal, so as to affect the heir; but not real burdens affecting the land. 26. June 1735, Ogilvies.

ONE having acquired an estate, and taken the same to himself in liferent, and to his son *nominatim* in fee, with a faculty "to burden, contract debt, and to sell, or otherwise dispose at his pleasure," did first grant a personal bond, declaring it to be a burden upon the fee, and thereafter sold the estate. In a competition between the creditor in the personal bond, and the purchaser infest, the Lords found, That the bond was no real burden upon the estate, and preferred the purchaser. Forb. 26. Dec. 1708, Davidson.

Competition of creditors claiming under the faculty.

IN a disposition to an eldest son, the father having reserved a faculty to burden the disponee with the sum of 4000 merks, in favor of a younger son, to be paid at the first term after the father's decease, or the younger son's marriage, did, many years after this younger son was married, exercise the faculty in his favor, by granting him a bond of provision, obliging his eldest son to pay the said 4000 merks, with interest *retro* from the said marriage. The eldest son objected to the clause of annualrent, and insisted, That there was no debt till the same was created by the father's exercising his faculty, consequently no annualrent *retro*, which would be *accidens sine subjecto*; The Lords found no annualrent, but from the date of the deed in exercise of the faculty. 2. Jan. 1759, Anderson.

Reserved faculties stricti juris.

FAIRS and MARKETS.

A PERSON being infest with the privilege of a fair, time out of mind, and a neighbour, within a mile, impetrating thereafter an infestment with the like privilege, and then making his fair to end only the day before the other used to begin; the Lords ordained the privilege of the latter to cease, as impetrate in *emulationem vicini*; and found, that the said fair could only be kept at any time after the end of the first heritor's fair, or at any time before it, only allowing a month to intervene between them. Dur.

Gift of a fair obtained by obreption. 24. June 1642, Falconer.—A gift of a fair was found void, as obtained by obreption or subreption, being upon the same day with a fair in the neighbourhood, which it was presumed the king would not have granted, had he known the truth. Stair, 24. Dec. 1679, Farquharson.—A royal burgh having obtained a charter from the king, containing sole right of fairs and markets within two miles of that burgh, exclusive of all others; whereupon they soon thereafter obtained decree of declarator, in absence, against a neighbouring heritor, who, notwithstanding, several years thereafter, procured a right from the parliament to hold two yearly fairs. Against which the burgh having then protested, and now raising a new declarator against him, that he had no right to hold a fair within these bounds; the Lords found the King denuded by the prior gift to the town, which had such a *jus quæsitum* thereby, that the heritor, notwithstanding the act of parliament in his favor, could hold no fairs within the said bounds. Fount. 7. Feb. 1706, Town of Stirling.

IN the case of stolen goods, the exception of bought in a public market was repelled; and the party allowed to sue the buyer for repetition, but not for any personal punishment; and this, altho' the thief was executed. Auch. (*Buying and Selling*) 2. July 1629, Bishop of Caithness.—A person buying a horse, tho' in a public market, is liable in restitution on

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on to the owner, and is to rest for his recourse against the seller upon burgh and hame-hald. Dur. 19. March 1639, Fergusson.

BREAKING of an arrestment in *Breaking of*
time of fairs found culpable. Mait. *arrestment in*
16. Nov. 1552, Gibson. *time of fair.*

FALSA DEMONSTRATIO.

A PARTY being assigned to L. 1000, owing to the cedent *per* bond, by a person of quality still alive, which bond the assignation bore to be granted in the year 1606; it was found, That the party had right to the L. 1000, granted by that nobleman to the same person in the year 1606; seeing another L. 1000 bond *inter eosd.* in the year 1606 could not be condescended on, and that neither of the parties was then born. Forb. 16. Feb. 1711, Dickson, &c.—One having disposed, with warrandice from his own fact and deed only, and particularly against an infestment in favor of one Janet Miller, proceeding upon a bond granted by a former heritor; in a question thereafter between the parties, Whether the warrandice was incurred? seeing there was no such infestment as the one described, but there was another in favor of one Jean Webster, proceeding upon a contract of marriage; the Lords found, That this was not *falsa demonstratio*, and that the warrandice was not incurred. Bruce, 2. Feb. 1715, Ogilvie.

FALSEHOOD.

A NOTARY, having filled up names in a past bill of suspension, more than was in it when presented, was deprived of his office. Falc. vol. I. p. 197. Leitch, 20. Jan. 1747.

FEES

FEES OF OFFICE.

THE executor of a clerk of Session has no right to any fees for extracts, &c. paid after his death, altho' he officiated as clerk of the process. Fac. Col. vol. I. p. 180. Finlayson, 7. Jan. 1755.

FERRY-BOAT.

WHERE a party has right to a ferry-boat, established by grant or prescription, it is not in the power of others, who may have a right of fishing upon the same part of the water; to interfere with the proprietor of the ferry-boat, by carrying over passengers for hire. Upon this footing the Lords found, That the other heritors might transport themselves and families, or others gratuitously in their coble-boats, but not for hire. And in this, ferry-boats are upon the same footing with fairs; both of them imply an exclusive privilege, otherwise they could not be kept up. 22. Dec. 1731, Tarbat.

F E U.

FEU-rights, granted before the act 1606, were valid, without consent of the superior, so as to exclude ward, recognition, &c. Stair, 24. June 1668, Stewart.—The like, unless the pursuer could alledge, That the feuduty was with diminution of the new retoured duty. Stair, 5. Jan. 1681, Dun.—Feus granted by vassals of ward-lands so long as the act of parliament 1457. cap. 71. stood, did exclude, not only ward and recognition, but forfeiture of the ward-vassal, grantee thereof, without necessity of confirmation. Stair, 12. Feb. 1674, Huntly. Stair, Fount. 16. Nov. 1680, Campbell. Harc. (*Forfeiture*) Jan. 1684, Campbell.

SELLING the act 1606, does only annul feus set by vassals,

vassals, holding ward of subjects without their superior's consent, it was found, That the superior, consenting to such a feu, the sub-vassal was only liable for his stipulated feu-duties; and that the ward and marriage of the vassal did only affect the vassal's interest, viz. the feu-duty. Gosf. 28. June, Stair, 1. July 1672, Eglinton.

FOUND, That ward-lands of the principality could not be disposed in feu, after the act 12. parl. 1606. Hope, (*Ward*) Dur. 7. July 1629, Lady Cathcart. See act 16. parl. 1633, where the contrary is understood.

A FEU, granted by a king's vassal, upon the authority of the 58. act, parl. 1641, was not found sufficient to defend against the ward and marriage of the superior, falling due after the rescissory act 1661. cap. 15. notwithstanding of the *salvo* at the end of the rescissory act, of all rights and securities in favor of private parties, seeing the same was not confirmed, which ought to have been done. Fount. 27. Feb. 1696, Philiphaugh.

Feu after 1606, with superior's consent, how far available?

Act 1606, how far extended?

Feu granted by the king's vassal, upon act 58. parl. 1641.

FEU-DUTIES.

A FEU-duty being payable in victual; in a question,

Who should carry the same? the Lords found, That where the superior dwelt without the barony, the vassal was not bound to go and seek him *extra curtem domini* (as the feudists speak); but if he lived *intra baroniam*, then the feuer was bound to bring it to the superior. Fount. 25. Feb. 1696, Treasurer of Edinburgh.

LANDS being feued, for a feu-duty payable in bear, at a time when no barley grew in Scotland; and the feuer having been in use, past memory of man, to pay a converted duty in silver; and now the feuer being in use to sow barley only, which the superior insisted for, being

Feu-duty in victual, who bound to carry the same?

Feu-duty payable in bear, if barley can be exacted?

entitled

entitled to demand the *ipsa corpora*; the Lords found, That such feus being perpetual locations, for meliorating and improving the ground, the superior had right to such grain as, by the vassal's industry, grew thereon. Fount. 25. Feb. 1696, Treasurer of Edinburgh.

A PERSONAL action is competent to the superior, for payment of his feu-duty, not only against the original feuer and his representatives, personally bound by subscribing the feu-contract, but also against singular successors purchasing from them; because the property is

truly reserved, in so far as relates to the superior's casualties; and therefore, all intromitters must be liable to the extent of the feu-duties. Dur. Spot. (*Feus*) 21. July 1630, Monerief. Dur. 24. Feb. 1632, Bishop of Gallo-way.—Yet it was found, That a tenant being removed before intenting the process, is not liable to a personal action at the superior's instance, for payment of the feu-duty. July 1738, Biggar.—But as the rent of

the land does belong to the superior, to the extent of the feu-duty only; he cannot insist against any intromitter, further than for the feu-duties arising during the years of his intromission; the remaining rents of any year, over and above the feu-duty, belonging, not to the superior, but to his vassal. Dur. 26. March 1629, Rollo. Dur. penult. Jan. 1639, Cockburn. Stair, 19. July 1665, Winram. Fount. Forb. 7. Feb. 1712, Hamilton.—But bygone feu-duties may be followed out, by poinding of the ground, against all singular successors. Dur. 26. March 1629, Rollo.

THE vassal, by accepting of a feu-charter, containing the clause *reddendo inde annuatim*, becomes thereby liable personally for the feu-duties, whether the charter is granted to him originally, or if he is a purchaser from the original vassal; and therefore a feu-vassal was found personally liable for the feu-duties, even after he had sold his land, and the purchaser in possession, by a minute of sale, but without getting a charter from the superior. 29. June 1739, Wallace.



